

Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JIMMIE D. OYLER,
Petitioner

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE 10TH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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130PP

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Federal District Court for the District of Kansas committed error and violated the mandatory commands of the Constitution of the United States, United States Treaties, United States Patent No. 206, Public Law 97-344 and Kansas Civil Procedure, Article 10, ACTIONS RELATING TO PROPERTY, K.S.A. 60-1001 thru K.S.A. 60-1010 et al.?

II. Whether the Federal District Court for the District of Kansas abused its discretion?

PARTIES

The parties to the proceedings in the Court of the Honorable John W. Lungstrum, United States District Court for the District of Kansas whose judgment is sought to be reviewed include:

Jimmie D. Oyler, Petitioner.

UNITED STATES OF AMERICA, BRUCE BABBITT, Secretary of the United States Department of Interior, ADA DEER, Assistant Secretary of the Interior for Indian Affairs; BUREAU OF INDIAN AFFAIRS, of the United States Department of the Interior; WILLIAM R. BANDY, BARBARA BALLENGER, a/k/a Barbara Ann Ballengaer Beckham; TOMMY LEE BECKHAM, GEORGE BLAIR, ALMA DICY BLAIR, ESTATE OF HOUSTON BLAIR, SYBIL BLAIR, ALICE MAXIE COHEN BOWLAN, ESTATE OF TILFORD BOWLAN, MARY BRANNAN BOYLES, A. H. BOYLES, ESTATE OF CHARLES FRANKLIN BRANNAN, FRANCES HANDY BRANNAN, a/k/a Frances Handy Brannan Wallace, a/k/a Frances Hanley Brannan; GLENN CLYDE BRANNAN, DELPHIA PARRETT BRANNAN, ROBERT CLARK BRANNAN, WANDA BRANNAN, BARBARA BLAIR BURKE, NAOMI LOUISE EMERSON CASEY, ESTATE OF ADA COWAN, J. M. COWAN, BEVERLY A. BALLENGER COX, ESTATE OF R. H. CROTZER, ESTATE OF WILLIAM F. CURREY, JR., a/k/a Bill Currey; DICK CURREY, JIMMY CURREY, ESTATE OF W.F. CURREY, ERNESTINE HALL, a/k/a Ernestine Hall DeMoss; HAROLD DEMOSS, ESTATE OF J. GERALD ELROD, ESTATE OF MARY S. ELROD, ESTATE OF JACKSON EMERSON, MORGAN EMERSON, VICTOR J. EMERSON, JANICE SPARKMAN, a/k/a Janice Sparkman Graham; JERRY GRAHAM, ESTATE OF BENJAMIN E. HALL,

PARTIES (continued)

a/k/a Ben Hall; ESTATE OF DELLA TANNER HALL; ESTATE OF EDITH SMITH HALL, ESTATE OF FRANK HALL, ESTATE OF MAY HALL, BILLY WAYNE HAMIL, PATSY LULOU KELLER HEADRICK, OCIE LOIS BLAIR HOLLOWAY, JEFFREY WILSOX HURT, ESTATE OF EDNA MARIE ANGEL JENSEN, ED JENSEN, FEROL E. SPARKMAN JINGST, ESTATE OF ETHELYNE HALL KELLER, ESTATE OF HOMER KELLER, ROBERT H. KELLER, JAN KELLER, JACK HALL KELLER, BETTY KELLER KRETCHMAR, BERNARD E. KRETCHMAR, ANNA LOUISE PATTERSON KRUSE, ESTATE OF HALLIE HALL, a/k/a Hallie Hall Kulchinski; ESTATE OF ERWIN KULCHINSKI, MILDRED NADINE B. LADUKE, REBECCA BRANNAN DAVIS LOYD, JAMES LOYD, EDNA MAE SPARKMAN MARSHALL, WILLIAM FRANKLIN MARSHALL, MYRTLE NEVADA HAMIL McLAUGHLIN, a/k/a Lavada Hamil McLaughlin; JEANNE REE HURT MULLINS, THELMA MARIE BALLENGER MURPHY, ROY MURPHY, DONALD RICHARD OYLER, PATRICIA J. HOLLIS PARKER, ESTATE OF PAT PATTERSON, ESTATE OF RONALD PATTERSON, LEAH ALICE EMERSON PRUSA, MARY ANN CURREY, a/k/a Mary Ann Currey Purdum; MYRTLE F.L.S. ROBERTS, a/k/a Myrtle Sparkman Roberts; DAVID SPARKMAN, RONALD SPARKMAN, RUBY SPARKMAN, L. D. SPIRES, THOMAS D. STEPHENSON, W. T. STEPHENSON, JILL KELLER THOMAS; C. J. THOMAS, DOROTHY S. TODD, ESTATE OF FLORA A. TODD, JOHN R. TODD, CHARLES H. TODD, JR., ESTATE OF JOHN WAGNER, ESTATE OF LOIS TODD WAGNER, HERBERT WILCOX, GEORGE FREDRICK WILLIAMS, ALMA SPARKMAN HERSHMAN, a/k/a Alma Sparkman Hershman Wilson; HAROLD W. WILSON, JOAN KELLER ZEMAN, EARL W. ALLEN, JEFFREY MORGAN BLAIR, DONNA BLAIR, CHRISTOPHER H. BLAIR, DEBORAH BLAIR,

PARTIES (continued)

CECIL CASEY, JIM COOMBES, DELLA M. COWAN,
 ALICE CRUMBLISS, SHARON CURREY, CAROL
 EMERSON, WILLIE RICHARD HAMIL, ELIZABETH
 L. HAMIL, RONALD K. HEADRICK PATRICIA E.
 HURT, PATTY KELLER, KARL E. KRUSE, VERNON
 KULCHINSKI, ROSS BOB MULLINS, CAROLYN
 OYLER, RAYMOND PRUSA ESTATE OF MYRTLE HALL
 SEBERT, EVERETT SEBERT, CORNELIA SPARKMAN,
 GLENDA SPARKMAN, MARLENE SPARKMAN, KENNETH
 ROY SPARKMAN, MELBA MAVIS HAMIL SPIRES,
 a/k/a Melba Leona Hamil Spires; NANCY
 TAYLOR, CAROL TODD, ROBIN KECK TODD,
 TYRELL S. WILLCOX, MELVIN ZEMAN, JOHN DOE,
 MARY ROE, SAMMY DALE BALLINGER, FRANCIS
 BAUER, MARY B. BAUER, MARY JANE CASH,
 EMOGENE F. CHASTAIN, a/k/a Emogene
 Satterwhite; ELLIS W. COWAN, NOBLE E.
 COWAN, SYDWELL W. COWAN, MARGARITTE P.
 CURREY, PAT CURREY, MARY S. ELROD, ZELMA
 KULCHINSKI, MARY E. MARTIN, ROY L. MILLER,
 JEANNETTE S. NAPHY, JOAN L. PATTERSON,
 LINDA SUE PATTERSON, RICHARD EUGENE
 PATTERSON, RODNEY SMITH, SANDRA
 JENSEN SMITH, DAVID K. VEAL, ROBIN
 PATTERSON VEAL, JOYCE RAY JENKINS COOMBES,
 DIXIE LEE JENKINS BANDY, and

Johnson County, Kansas, Commissioners
 Represented by

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On November 17, 1994, the United States District Court for the District of Kansas entered its MEMORANDUM AND ORDER in Case No. 92-2104-JWL ordering the total property be placed up for public auction. The Federal Marshal published his "Notice of Marshal's Sale" (Appendix H). (Appendix I) is how the notice appeared in The Johnson County Sun. The Federal Marshal then issued his "Return of Marshal" (Appendix J) that notified the Court that he had cancelled the sale due to the issuance of Memorandum of Order issued by Judge Lungstrum on March 17, 1995.

After publishing (Appendix K and L) the United States District Court for the District of Kansas on July 7, 1995, entered its MEMORANDUM AND ORDER (Appendix M) in Case No. 92-2104-JWL. This MEMORANDUM AND ORDER reversed the Courts previous Court Order requiring the total property be sold at public auction.

Petitioner then appealed this action to the United States Court of Appeals for the Tenth Circuit. On February 8, 1996, a three-judge panel of the Tenth Circuit Court of Appeals, affirmed the District Courts finding, Jimmie D. Oyler v. United States of America, et al., (Appendix N). On February 22, 1996, Petitioner petitioned the Tenth Circuit for rehearing with suggestion for rehearing en banc. The Court of Appeals denied the petition for rehearing on March 21, 1996, (Appendix O) and issued it mandate on March 29, 1996, (Appendix P).

JURISDICTION

Petitioner seeks review of the Tenth Circuit Court of Appeals ORDER AND JUDGMENT decided February 8, 1996, (Appendix N).

Petitioner filed a timely petition for rehearing on February 22, 1996, which was denied by ORDER of the Court on March 21, 1996. This Petition for Writ of Certiorari was filed within 90 days of the Tenth Circuit order denying rehearing.

This Court has jurisdiction to review the opinions of the Federal District Court for the District of Kansas and the Tenth Circuit Court of Appeals Order and Judgement because of the Constitutional questions, the judgement differs with other Circuit Courts and pursuant to 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

I. The mandatory command of the word "shall" as mandated by the Constitution of the United States, United States Treaties, a United States Patent, and Federal and State laws.

II. The pertinent part of the Fourteenth Amendment to the Constitution of the United States that mandates:

...nor shall any State deprive any person of life, liberty, or property, without due process of law;...

III. The pertinent part of Kansas Civil Procedure, Article 10, ACTIONS

RELATING TO PROPERTY, K.S.A. 60-1001 thru K.S.A. 60-1010 et al., specifically, K.S.A. 60-1003(c)(4), Election or Sale, mandates:

...or two or more elect to take, in opposition to each other, the judge shall order the sheriff to sell it in the manner provided for sale of property on execution...

STATEMENT OF THE CASE

The Federal District Court violated the mandatory command of the word "shall" as mandated by the Constitution of the United States, United States Treaties with the Shawnee, Public Law 97-344 and Kansas Civil Procedure, Article 10, ACTIONS RELATING TO PROPERTY, K.S.A. 60-1001 thru K.S.A. 60-1010 et al.

The Federal District Court violated Public Law 97-344 when the Court failed to remove the trust control of the Bureau of Indian Affairs from over restricted Indian Country known as Shawnee Reserve 206 during a partition action of subject property, by a co-owner, Indian or non-Indian, in the Federal Courts, by the use of Kansas Civil Procedure, Article 10, ACTIONS RELATING TO PROPERTY, K.S.A. 60-1001 thru K.S.A. 60-1010 et al., as mandated by Public Law 97-344.

In this case the District Court committed error. The District Court did exactly what is prohibited by the statute. Notwithstanding that the parties are equals with respect to the right of election, the District Court favored one

electing party over the other by refusing to order the property to sale at public auction and awarding a large portion of the property in kind to the favored electing party.

The District Court ignored the mandates of the Kansas partition laws, arbitrarily followed the desires of the government and the "Exhibit A" Defendants (Indian and non-Indian) and abused its discretion.

The United States Court of Appeals for the Tenth Circuit has upheld the Federal District Court for the District of Kansas in it's abuse of discretion, error of the Court and failure of the Court to comply with the guarantees of, and the mandatory command of, the word "shall" mandated by the Constitution of the United States, United States Treaties, a United States Patent and Federal and Kansas State laws, specifically Public Law 97-344, (Appendix D) and Kansas Civil Procedure, Article 10, ACTIONS RELATING TO PROPERTY, K.S.A. 60-1001 thru K.S.A. 60-1010, and involves armed United States Marshals, no jury trial as requested by Petitioner and Indian and non-Indian co-owners of a fractionated restricted Indian Country allotment beginning in the year 1859 to the present day.

The United States has Federal Laws that allow immigrants, Indians and non-Indians, to become citizens of the United States and the states in which they live. But, the United States does not have a Federal Law that provides for immigration of non-Indians into Indian Country and

Indian families.

This case is now ripe for judicial review by the Supreme Court of the United States. A review by the Supreme Court will establish a framework that will guide the Federal Courts in the partition and or sale of Indian Country that has had immigration of non-Indians into Indian families.

REASON FOR GRANTING

I

The Federal District Court for the District of Kansas committed error and violated the mandatory commands of the Constitution of the United States, United States Treaties, United States Patent No. 206, Public Law 97-344 and Kansas Civil Procedure, Article 10, ACTIONS RELATING TO PROPERTY, K.S.A. 60-1001 thru K.S.A. 60-1010 et al.

Article X of the United States Treaty with the Shawnee, dated August 8, 1831 (7 Stat. 355), provides that: ...The lands granted by this agreement and convention to the said band or tribe of Shawnees, shall not be sold nor ceded by them, except to the United States...

The May 10, 1854 United States Treaty (10 Stat. 1053) with the United Tribe of Shawnee Indians provided that the tribal reservation lands established by the United States Treaty with the Shawnee, dated November 7, 1825, (7 Stat. 284), and the United States Treaty with the Shawnee, dated August 8, 1831 (7 Stat. 355), could

be patented to individual Indians of the United Tribe of Shawnee Indians. Subject Treaties and Patent (Appendix A) did not provide for immigration of non-Indians into the Indian families of the United Tribe of Shawnee Indians. (citation omitted).

Public Law 97-344 (Appendix D) provided "that any owner of an interest in the following lands, which includes Shawnee Reserve 206 (Appendix A), ...may commence an action in the United States District Court for Kansas to partition the same in kind or for the sale of such lands in accordance with the laws of the State of Kansas. (citation omitted).

Newton McNeer a tribal member of the United Tribe of Shawnee Indians was issued United States restricted Patent, Shawnee No. 206, (Appendix A), the Indian Country that is the subject of this case.

The Bureau of Indian Affairs (BIA) has estimated there are now more than 1,000,000 Indians that are co-owners of fractionated Indian Country allotments scattered throughout the United States that has resulted from a failed Federal Indian Policy on Indian Country allotments of tribal reservation lands that did not provide for immigration of non-Indians into the tribal Indian families. The exact number of Indian co-owners of fractionated Indian Country allotments in the United States is not known by the BIA, and the BIA in most cases has no record of the non-Indian co-owners.

This failed policy has caused expense

on the Federal budget and has prevented the subject Indian allotments from becoming productive components of the Republic of the United States and their associated Indian tribes.

After allotment in 1859 the ownership of subject allotment has become fractionated with non-Indian immigration that was not provided for in subject treaties and subject Patent. (citation omitted) See: List of Parties.

From 1859 to the present day the BIA thru the Secretary of the Interior has not given permission for subject patented allotment to be sold or conveyed, except as listed 25 CFR Indians, Part 152.25, (4-1-94 Edition).

After Petitioner, Petitioner's brother, mother and father, and grandmother and other Shawnee Indians have spent many years working with the BIA, attempting to achieve a solution to the immigration of non-Indians into Indian families and the resultant fractionation of Indian allotments, Petitioner knows the following to be true:

The BIA has attempted to maintain the status quo. For the BIA to do otherwise would end the many years of the BIA bureaucracy, "red tape", end their assumed need for their trust responsibility over Indian Country, end their drain on the Federal budget and the tax payers and put themselves (Indians) out of a job.

This case is a prime example of the

status quo of the BIA and begs for the Supreme Court of the United States to establish a framework for a final solution to immigration of non-Indians into Indian families. Non-Indians that are the mothers and fathers, and grandmothers and grandfathers of Indian children, as are the Indian mothers and fathers and grandmothers and grandfathers, strong families that are the backbone of this Great Republic composed of Indians and non-Indians, Indian tribes and states within the United States as guaranteed by the Constitution of this Great Republic.

Article X of the August 8, 1831 Treaty with the Shawnee provides:

...The lands granted by this agreement and convention to the said band or tribe of Shawnee, **shall** not be sold or ceded by them, except to the United States. And the United States guarantee that the said lands **shall** never be within the bounds of any state or territory, nor subject to the laws thereof; And further, that the President of the United States will cause said tribe to be protected at their intended residence, against all interruptions or disturbances from any other tribe or nations of Indians, or from any other person or persons whatever, and he **shall** have the same care and superintendence over them, in the country to which they are to remove, that he has heretofore had over them at their present place of residence... See: United States Treaty with the Shawnee, August 8,

1831 (7 Stat. 355). The Court also confirming. See: The Kansas Indians (Blue Jacket v. The Board of Commissioners of the County of Johnson), 72 U.S. (5 Wall) 737-757, (1867).

This Court's ruling on United States treaties with the United Tribe of Shawnee Indians and Shawnee restricted Indian Country allotments is contained in "The Kansas Indians". (citation omitted). This Court stated in "The Kansas Indians":

Indians with separate estates have the same rights in the tribe as those whose estates are held in common. See: The Kansas Indians (Blue Jacket v. The Board of Commissioners of the County of Johnson), 72 U.S. (5 Wall) 737-757, (1867).

This Court in State of Missouri v. Holland, U.S. Game Warden, 252 U.S. 416, 1920, ruled that valid treaties are as binding within the territorial limits of the states as throughout the dominion of the United States. (citation omitted).

This court ruled in Menominee Tribe v. United States that:

Indian treaties were, and remain today, the Supreme law of the land, superior to the laws of any state, and protected by Article VI of the United States Constitution. Only the Congress, through the exercise of it's plenary power over Indian affairs, may terminate Indian treaty rights. Should the abrogation of

such rights occur, however, the affected tribes would be entitled to compensation under the Fifth Amendment to the United States Constitution. See: Menominee Tribe v. United States, 391 U.S. 404.

The Congress of the United States in the passage of Public Law 97-344 did not abrogate or terminate any rights, guarantees or privileges of any United States Treaty with the United Tribe of Shawnee Indians, but did in fact correct a failed Federal BIA Indian policy on heirship of Patented restricted allotments and authorized Indian and non-Indian co-owners of subject restricted allotments, the right to utilize the Federal Courts to clean up the co-owner heirship fractionated interest problem by utilizing Kansas Partition Law. See: (Appendix A, B, C, & D) for background on the problem of Indian and non-Indian heirship.

Indian Country is defined by (18 U.S.C. Section 1151, a, b & c) (citation omitted) and as this Court ruled in Oklahoma Tax Commission v. Sac and Fox Nation, 508 U.S._____, 124 L. Ed. 2d 30, 39, 113 S. Ct. _____ (1993), (Citation omitted).

Petitioner is a tribal member and Principal Chief of the United Tribe of Shawnee Indians, a Shawnee Indian descendant of Shawnee Indians Newton and Nancy McNeer, the original Shawnee Indian owners of Shawnee Reserve 206, (Appendix A) and is a continuing and enduring agent of the United Tribe of Shawnee Indians as the United Tribe of Shawnee Indians

existed in 1854. See: The Kansas Indians (Blue Jacket v. The Board of Commissioners of the County of Johnson), 72 U.S. (5 Wall) 737, (1867). (citation omitted).

While in military service for the United States, Petitioner was informed by the Bureau of Indian Affairs (BIA) in 1968 via Petitioner's brother, that the Federal Government had no Federal law Petitioner could use to clean up the fractionated co-ownership (Indian and non-Indian) problem of subject Indian Country (Appendix A) and had reached an impasse, (Appendix b). Citation omitted.

In 1975, as an heir apparent, Petitioner occupied subject property by adverse possession as recommended by the BIA, (Appendix B). Petitioner notified the President of the United States, the newspapers and others, to include other co-owners, (Indian and non-Indian), that Petitioner had not reached an impasse and had occupied subject property and was taking all non-Indian interest by adverse possession and would use whatever force was necessary to achieve his adverse possession of the non-Indian interest.

Defendant John Todd testified to the Court "that Petitioner had stated to him, that Petitioner would kill him if necessary to achieve Petitioner's adverse possession of the non-Indian interest".

Petitioners notification that Petitioner has occupied subject property by adverse possession is still in effect and has not been rescinded by Petitioner.

In 1975, Petitioner began to consolidate his land ownership interest, by gift and conveyance, of both non-Indian and Indian interest, as authorized by 25 CFR Indians, Part 152.25, (4-1-94 Edition). Citation omitted.

By treaty and patent the Indian held restricted interest cannot be taken by adverse possession. (Appendix A).

Petitioner became an heir on February 3, 1986, with the death of Petitioner's Mother.

Senate Bill 478, was sponsored by the Honorable Senator Bob Dole (Appendix C) and became known as Public Law 97-344, (Appendix D).

I, Shawnee Indian Jimmie D. Oyler, after eighteen (18) years of adverse possession of subject property, then filed this action in the Federal District Court for Kansas, based on Kansas Civil Procedure, Article 10, ACTIONS RELATING TO PROPERTY, K.S.A. 60-1001 thru K.S.A. 60-1010 et al., as required Public Law 97-344, Oct. 15, 1982, 96 Stat. 1645, to find that: I, Shawnee Indian Jimmie D. Oyler had adversely possessed the total non-Indian interest in accordance with the laws of the State of Kansas; and to have approved and conveyed to me certain notarized deed conveyances that were sold and conveyed to Petitioner in Petitioner's consolidation effort, as authorized by 25 CFR Indians Part 152.25, by other Indian and non-Indian co-owners, deeds that are mandated non-restricted interest in this action; and to have the total interest

partitioned out (improvements, water supply system and land interest) in restricted Indian Country status as mandated by Public Law 97-344; and to have Johnson County, Kansas, pay a just compensation for their use of Right-of-Way over subject Indian Country land as mandated by United States Treaties with the Shawnee.

The District Court approved the non-Indian deeds, but would not approve any of Petitioners adverse possession of the non-Indian interest and would only grant Petitioner two (2) of the restricted deeds with the BIA's approval.

The District Court in violation of Public Law 97-344, left the Indian owned restricted interest under the trust responsibility of the BIA during this action as restricted interest.

Public Law 97-344 removes the BIA from any trust responsibility on conveyance (Appendix D) during any partition action in the Federal Courts based on Kansas Partition Laws.

After the Court action is over Public Law 97-344 states as follows:

...Any conveyance ordered by the court in such proceedings will be made in unrestricted fee simple to non-Indian grantees and in restricted fee to Indian grantees... See: (Appendix D).

Petitioner had purchased and paid for all of the Indian interest deeds at two

(2) times' the Court appraised value of subject property. The Indian co-owner deeds were all notarized. The Court records show that attached to all the deeds (Indian and non-Indian) was a notarized Purchase Agreement and a notarized Application For Sale With Disclosure Statement and Agreement.

The Court in violation of Public Law 97-344, ordered the BIA to continue their trust responsibility on conveyance of the property as restricted property during this action. The BIA would not approve the notarized Indian deeds with the attached notarized Purchase Agreement and the notarized Application For Sale With Disclosure Statement and Agreement.

Petitioner under duress was ordered by the Court to accept the Court approved percent ownership interest. Petitioner requested permission to appeal that decision (Interlocutory Appeal) to the United States Court of Appeals for the Tenth Circuit but was denied by the District Court.

The District Court then ordered the Court-appointed commissioners to make an appraisal with armed Federal Marshals. (Appendix E).

The District Court, with the United States in agreement, ruled that subject property was not agreeable to all parties for a partition.

The Court then ordered and allowed all parties to this action to elect to take the property as a whole as mandated

by K.S.A. 60-1001 thru K.S.A. 60-1010 et al. Petitioner submitted an Irrevocable Letter of Credit (Appendix F) and Defendant Ronald Sparkman submitted a Commercial Letter of Credit, (Appendix G). Petitioner motioned to the Court that Petitioner was the only co-owner that had fulfilled the Court order to take the property as a whole. The Court ruled that both letters (Appendix F & G) satisfied the election to take the property as a whole at the appraised value.

The District Court by Court Order, (Appendix H) then placed the property up for auction as mandated by K.S.A. 60-1001 thru K.S.A. 60-1010 et al. The auction notice was placed in the local newspaper (Appendix I) by the United States Marshal as ordered by the Court and mandated by Kansas law.

The District Court then Ordered the Federal Marshal to cancel the public auction (Appendix J).

Petitioner by motion to the Court requested a jury trial as mandated by Kansas partition law when the public auction is canceled. Petitioner's motion for a jury trial was denied by the District Court in violation of Kansas partition law.

The Federal District Court then turned right around and by fiat orders sold Indian and non-Indian property, exceeding fifty five (55) percent of the total, to other non-Indian and Indian Defendants, that included Defendant Ronald Sparkman, without allowing Petitioner the

opportunity to purchase same at a public auction in violation of the Constitution of the United States, Public Law 97-344 and K.S.A. 60-1001 thru K.S.A. 60-1010 et al.

Throughout this action the BIA and the United States Attorney representing the BIA have been adverse to Petitioner.

The United States Attorney representing the BIA did not inform the Indian owners that the BIA had agreed to sell their property to other Indians and non-Indians.

The Court records also show Petitioner accused the Court of feeding out of the hands of the United States Attorney.

The District Courts action took Petitioners water supply system which included an irrigation system, a fire protection system and a potable water system with an associated pipe line system. The Johnson County Rural Water District Number 1, had furnished to the Court a \$184,000.00 replacement cost for Petitioner's total water system. The Court took Petitioner's road leading to Petitioner's home. The District Court took all of the frontage in front of Petitioner's business building making the business building and Petitioner's land located to the North of subject land unusable and keeping Petitioner from self employment in subject building. The District Court sold the land Petitioner has a 40 foot storage building located on to other Indians and non-Indians without

giving Petitioner a chance to purchase the land at a public auction. The District Court awarded Petitioner's property in two (2) different locations almost one-half (1/2) mile a part with no means to connect same.

The Court awarded Johnson County, Kansas, right-of-way over Shawnee Reserve 206, in violation of United States Treaties with the United Tribe of Shawnee Indians, without payment of a just compensation. Subject treaty is guaranteed the Supreme Law of the Land by the Constitution, See: The 1854 Treaty with the United Tribe of Shawnee Indians, 10 Stat. 1053; (citation omitted), and United States Constitution, Article 6, Clause 2, (citation omitted).

The BIA and Johnson County, Kansas had confirmed that Johnson County, Kansas was in trespass.

The 206 Patent issued by President James Buchanan, 28 December, 1859, states:

...that the said tracks "shall" never be sold or conveyed, " by the Grantee or the heirs, "without the consent of the Secretary of the Interior for the time being."...and assigns forever...

Without the removal of the trust responsibility of the BIA during this partition action, as the Congress has mandated, over subject Indian Country "the said track (Appendix A) shall never be sold or conveyed". To do so the District Court would be in violation of the Shawnee 206 Patent, the Constitution of the United

States, United States treaties with the Shawnee and Public Law 97-344 would be unconstitutional.

As stated by the Honorable Senator Bob Dole, the author of Senate Bill 478 that became Public Law 97-344, (Appendix C), in his letter dated February 23, 1982, to Petitioner Jimmie D. Oyler:

...Every Indian law expert who has ever seen this bill has agreed that this is the best way for you and the other heirs to ever hope to have an outright ownership of any part of the land, and the only way that you and the other heirs can ever sell, or otherwise exchange pieces of the land...

The Federal District Court for the District of Kansas rulings have violated a United States Patent, the Constitution of the United States, United States Treaties, and Federal and State laws by failing to comply with the mandatory command of the word "shall" as mandated by Public Law 97-344 and the Kansas Civil Procedure, Article 10, ACTIONS RELATING TO PROPERTY, K.S.A. 60-1001 thru K.S.A. 60-1010 et al.

As written by the Honorable Senator Bob Dole, the author of Senate Bill 478 that became Public Law 97-344, "It was never the intention to do you any personal harm, and I sincerely expect the end result will benefit you, just as it will the other heirs", (Appendix C).

The Federal District Court violations have resulted in a greater fractionation

adding more Indian and non-Indian co-owners than when this case started and has placed the Federal District Court's awarded co-owners outside of the United States protection.

Petitioners adverse possession is still in effect and the Constitution of the United States guarantees that Article VII of the Treaty with the Shawnee, January 31, 1786, (7 Stat. 26) is the Supreme Law of the Land. Subject Article states as follows:

"If any citizen of the United States **shall** presume to, settle upon the lands allotted to the Shawanoes by this treaty, he or they shall be put out of the protection of the United States." (emphasis added). See: United States Treaty with the Shawnee, January 31, 1786, (7 Stat. 26).

Article 12 of the United States Treaty with the Shawnee, May 10, 1854 (10 Stat. 1053), states the following:

...If, from causes not now foreseen, this instrument should prove insufficient for the advancement and protection of the welfare and interest of the Shawnee, Congress may hereafter, by law make such further provisions, not inconsistent herewith, as experience may prove to be necessary to promote the interest, peace, and happiness of the Shawnee people...

The violations of the Federal

District Court have not promoted the interest, peace and happiness of the Shawnee people and shall not be allowed to stand. Any Defendant that attempts to impose the District Court's imposed violations upon Petitioner shall be put out of the protection of the United States. See: United States Treaty with the Shawnee, January 31, 1786, (7 Stat. 26).

Congress mandated by the passage of Public Law 97-334 (Appendix D) that the Federal Courts shall follow the Kansas partition statutes during this action and remove the BIA during the course of the action from trust responsibility over subject Indian Country property.

In Kansas, a partition action is largely governed by statute, and although a court is vested with discretion in these cases, a court is prohibited from taking any action which is not compatible with this statutory law. Shell Oil Company v. Seeligson, 231 F.2d 14, 17 (10th Cir. 1955) (citations omitted); see also K.S.A. 60-1003(d). As to the steps to be taken in making a partition, a court must follow the express provisions of this statute. Johnson v. Burns, 160 Kan. 104, 159 P.2d 812, 814 (1945), (citation omitted).

The State of Kansas has a comprehensive statute governing the partitioning of property in the State. See K.S.A. 60-1003. The procedure for making a partition is set forth in K.S.A. 60-1003(c). Specifically, K.S.A. 60-1003(c)(4) states:

(4) Election or Sale. Where the property is not subject to partition in kind, any one or more of the parties may elect within a time so fixed by the judge to take the property or any separate tract at the appraised value, but if none of the parties elect to so take the property, or two or more elect to take, in opposition to each other, the judge shall order the sheriff to sell it in the manner provided for sale of property on execution. No sale shall be made at less than two-thirds of the valuation placed upon the property by the commissioners. (emphasis added).

The provisions set forth in K.S.A. 60-1003(c)(4) are clear, unambiguous and are not to be disregarded by the court. In addition, these provisions are mandatory and are necessary to preserve the rights of the parties.

The District Court failed to follow the mandates of this statute. K.S.A. 60-1003(c)(4) clearly requires the court to order the sheriff to sell the property when two or more parties elect to take the property in opposition to each other. Although two parties (Appendix F and Appendix G) had made the elections in this case, the District Court subsequently refused to order the property sold by the sheriff as mandated by K.S.A. 60-1003(c)(4). Instead, the District Court reversed itself and over the objection of Petitioner, awarded the majority of the

property in kind to one of the electing parties (Indian and non-Indian). In so doing, the court flagrantly ignored the mandates of the statute, trampled upon the rights of the Petitioner and committed error.

With respect to statutory construction, it is presumed that the legislature understands the meaning of the words it uses in statutes and that it uses the words in their ordinary common meaning. Boatright v. Kansas Racing Comm'n, 251 Kan. 240, 245-246, 834 P.2d 368 (1992); In re Guardianship and Conservatorship Fogle, 17 Kan.App.2d 357, 361 (1992); Rogers v. Shanahan, 221 Kan. 221, 223-224, 565 P.2d 1384 (1976). Similarly, when the language used by the legislature is plain and unambiguous and also appropriate to an obvious purpose, the courts are required to follow the intent of the legislature as expressed by these words. City of Overland Park v. Nikkias, 209 Kan. 643, 498 P.2d 56 (1972). Furthermore, where the legislature uses different language in the same connection in different parts of the statute, it is presumed that the legislature intends a different meaning with respect to the different words used. Id.

K.S.A. 60-1003(c)(4) states that the court shall order the sheriff to sell the property subject to the partition action if two or more parties elect to take the property at its appraised value. The ordinary, common meaning of shall is must. Escoe v. Zerbst, 295 U.S. 490, 493 (Cardoza, 1934); Webster's Third New International Dictionary; See also

("shall" expresses what is mandatory); Black's Law Dictionary ("shall" is a word of command which in its ordinary usage means must and which is inconsistent with the concept of discretion). In other words, after parties have been given the opportunity to elect to take the property at its appraised value and two or more parties so elect to take in opposition to each other, the statute commands the court to order the sheriff to sell the property. The use of the word shall in this circumstance is clearly mandatory. Furthermore, the legislature uses in this statute the words may and shall. If the legislature had intended for the court to have discretion in this situation, it could have easily provided for such discretion by using the word may (it used the word may in at least seven occasions in this statute). However, the legislature did not use the term may in this situation, but rather used the word shall. Such a distinction clearly evidences the intent that the use of shall in this circumstance is intended to be mandatory.

Several Kansas cases have held that the use of the word shall in a statute is mandatory. See, e.g. City of Manhattan v. Ridgeview Building Co., Inc., 215 Kan. 606 (1974); Barnhart v. Kansas Dept. of Revenue, 243 Kan. 209 (1988); State v. Deavers, 252 Kan. 149 (1992); Unified School District No. 252 v. South Lyon Teachers Assoc., 11 Kan.App.2d 245 (1986); In re Guardianship and Conservatorship of Fogle, 17 Kan.App.2d at 357. The term is mandatory when it is used by the legislature to preserve a right of one of

the parties. Griffin v. Rodgers, 232 Kan. 168, 174, 653 P.2d 463 (1983) (citing Paul v. City of Manhattan, 212 Kan. 381, 511 P.2d 244 (1973)). As stated by the Supreme Court of Kansas in State v. Deavers:

...Whether language in a statute is mandatory or directory is to be determined on a case-by-case basis and the criterion as to whether a requirement is mandatory or directory is whether compliance with such requirement is essential to preserve the rights of the parties. In determining whether a legislative provision is mandatory or directory, it is a general rule that where strict compliance with the provision is essential to the preservation of the rights of parties affected and to the validity of the proceeding, the provision is mandatory, but where the provision fixes a mode of proceeding and a time within which an official act is to be done, and is intended to secure order, system, and dispatch of the public business, the provision is directory. Factors which would indicate that the provisions of a statute or ordinance are mandatory are: (1) the presence of negative words requiring that an act shall be done in no other manner or at no other time than that designated, or (2) a provision for a penalty

or other consequence of noncompliance... 252 Kan. at 167 (citations omitted).

The requirement of K.S.A. 60-1003(c)(4) that the property be sold when two or more parties elect to take in opposition to each other is mandatory because the sale is essential to the preservation of the parties right to elect. By requiring the sale, the statute protects the rights of the parties and each is given a fair and equal opportunity to acquire the property at public sale. Furthermore, after two or more parties have elected to take the property and the court orders the property to sale, the statute prohibits the property from subsequently being sold for less than two-thirds of its appraised value. The statute specifically provides for consequences in the event that the property is subsequently forfeited at the sale for a price well below its appraised value. Such consequences indicate the mandatory nature of the statute. Id.

The right of a party in a partition action to elect to take the property at its appraised value has been long recognized by the Kansas courts as a valuable and substantive right. Morris v. Tracy, 58 Kan. 137, 48 P. 571 (1897). Other jurisdictions are in accord. 68 C.J.S. Partition §166-68; Rankin v. Coffey, 174 N.E.2d 631 (Ohio Ct. App. 1960); Janik v. Janik, 474 N.E.2d 1054, 1057 (Ind. Ct. App. 1985); McCready v. McCready, 810 P.2d 624, 627 (Ariz. Ct. App. 1991). In Morris, the Supreme Court of Kansas overturned a trial court who

forced a sale of land without affording the parties a reasonable period of time in which to exercise their right to make an election to take the property at its appraised value. The court reasoned that since the statute allows any one or more of the parties to elect to take the property at its appraised value, it was error for the court to direct a sale of the land without first affording a fair and reasonable opportunity to the owners to make their elections. 58 Kan. at 141.

The right of election is wholly of statutory origin. 68 C.J.S. Partition §§ 166-68. In Kansas, the right is conferred by K.S.A. 60-1003(c)(4). The right is also shared equally among the parties.

It has been held that the right to elect does not abide alone in one cotenant, but any one or more of the cotenants has the same right. They stand as equals in relation to that right, and if two or more have elected to take the land at the appraised value, a public sale of the same will be required. Rankin, 174 N.E.2d at 633 (emphasis added, citations omitted).

Because of this equal status, once two or more parties have elected to take the property, the statute prohibits the court from thereafter favoring one party over the other, and a public sale is mandatory.

The necessity of a sale in case

of conflicting elections arises from the impossibility of carrying out the statute in such case, and under such circumstances the courts have, it seems, uniformly adopted the procedure of ordering a sale, refusing all the conflicting elections.' Id. If it were otherwise, the court would be treating the parties unequally and effectively divesting one party of its right of election. Once vested, the right of election cannot be subsequently divested by court action. 68 C.J.S. Partition §§ 166-168. As stated recently by the Arizona Court of Appeals in McCready:

It is well settled that when there are but two parties and each desires to have allotted to himself or herself the whole cotenancy property, the court cannot arbitrarily decide that one shall have the property to the exclusion of the other. 310 P.2d at 627 (citing 68 C.J.S. Partition §168(2)).

In this case, the District Court did exactly what is prohibited by the statute. Notwithstanding that the parties are equals with respect to the right of election, the District Court favored one electing party over the other by refusing to order the property to sale and awarding a large portion of the property in kind to the favored electing party, Indian and non-Indian. In so doing, the court

committed error.

The pertinent part of the Fourteenth Amendment to the United States Constitution mandates:

...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws...

In sum, under the Constitution and under Kansas law, when two or more parties elect to take the property at its appraised value in opposition to each other, a court must order the sheriff to sell the property. This requirement is mandatory. Since the District Court in this case refused to order the sale when conflicting elections existed, the District Court committed error. The District Court's error has violated the Constitution of the United States, United States Treaties with the Shawnee and has imposed manifest injustice on Petitioner.

As such, the District Court must be overturned.

II

The Federal District Court for the District of Kansas abused its discretion.

The pertinent part of the Fourteenth Amendment to the United States Constitution mandates:

...nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws...

The court abuses its discretion when its decision is not sanctioned by law. 36 C.J.S. Federal Courts § 297(55). Reversal is appropriate if the decision is based on an erroneous view of the law or on a clearly erroneous view of the evidence. White v. General Motors Co., 977 F.2d 499,501 (10th Cir. 1992). If a statutory right is at issue, the trial judge's discretion is limited. See Saucedo v. Winger, 252 Kan. 718, 731, 850 P.2d 908 (1993). Discretion must be exercised in accordance with principals of law. Id. Discretion is not an arbitrary power. Id.

The District Court abused its discretion in this case because its decision to award the majority of property in kind to one of the electing parties after two had elected to take the whole, is not compatible with the statutes of Kansas and flagrantly ignores the rights of the Petitioner. A review of the decisions of the District Court in this case indicates that the District Court simply arbitrarily followed the positions set forth by the government and the Exhibit "A" Defendants. Thus, for example, when the commissioners responded with a proposed in kind distribution, the government objected. Accordingly, the Court also objected and ordered the property sold. However, when the government subsequently entered into a deal with the Exhibit A Defendants whereby the government agreed to sell its Indian interests to the Exhibit A Defendants

prior to the date of the Court ordered sale, the government moved to stop the previously ordered sale and asked the Court to award the property in kind, to allow this deal to be consummated. Accordingly, the court reversed itself and followed the position of the government. By so doing, the District Court ignored the mandates of the Kansas partition laws, arbitrarily followed the desires of the government and the "Exhibit A" Defendants, and abused its discretion. The remedy of partition cannot become an instrument of fraud or oppression. Shell Oil Company, 231 F.2d at 17. As such, the District Court must be overturned.

CONCLUSION

For all the above-stated reasons, Petitioner respectfully request that the United States Supreme Court overturn the Federal District Court for the District of Kansas and grant its Certiorari Petition.

Respectfully submitted,

Jimmie D. Oyler, Pro se
P.O. Box 637
Shawnee Reserve 206
De Soto, KS 66018
913-583-3236

APPENDIX

THE UNITED STATES OF AMERICA

SHAWNEE)
) PATENT
NO. 206)

To all to whom these presents shall come,
greeting:

WHEREAS, Under the provisions of the 2d and 9th Articles of the Treaty concluded on the 10th day of May, A. D. 1854, between the Commissioner on the part of the United States and the Delegates of the United Tribe of Shawnee Indians, certain members of said tribe became entitled, out of the lands ceded by said Treaty, "if a single person" to "two hundred acres, and if the head of a family, a quantity equal to two hundred acres for each member of his or her family," and to a patent therefor, upon provision being made by Congress for the issuing of the same; which has been done by the 11th Section of the Act of Congress, approved 3d March, 1859; (U.S. Statutes, Vol. 11, page 430). AND WHEREAS, it appears from "Reservation, Book C," accompanying a Return, dated November 6th, 1857, from the Office of Indian Affairs, to the General Land Office, that there have been located and approved, as the selection for Newton McNeer the head of a family consisting of himself and Nancy McNeer, the following described tracts of land, to wit: The East half of the South West quarter of Section Twenty Five (80 acres). The North West quarter of the South West quarter of Section Twenty Five (40 acres). The South half of the South East quarter of Section

Twenty Five (80 acres) in Township Twelve South of Range Twenty Two East. The North half of the South East quarter of section Twenty Five (80 acres). The East half of the North East quarter of Section Twenty Five (80 acres). The North West quarter of the North East quarter of Section Twenty Five (27.30 acres) in Township Twelve South of Range Twenty Two East of the Sixth Principal Meridian in Kansas containing in the aggregate Three hundred and Eighty Seven acres and thirty hundredths of an acre.

NOW KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, and in accordance with the directions of the Secretary of the Interior, under the aforesaid 11th Section of the Act of Congress of March 3d, 1859, HAVE GIVEN AND GRANTED, and by these presents DO GIVE AND GRANT, unto the said Newton McNeer as the head of the family as aforesaid the tracts of land above described; but with the stipulation described by the Secretary of the Interior, under the Act of Congress aforesaid, of March 3d, 1859, that the said tracts "shall never be sold or conveyed," by the Grantee or his heirs, "without the consent of the Secretary of the Interior for the time being." TO HAVE AND TO HOLD the said tracts of land, with the appurtenances, unto the said Newton McNeer as the head of the family as aforesaid and to his heirs and assigns forever, with the stipulation aforesaid.

IN TESTIMONY WHEREOF, I. James Buchanan, President of the United States, have caused these letters to be made

Patent, and the SEAL of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the CITY OF WASHINGTON, this twenty eighth day of December in the year of our Lord one thousand eight hundred and fifty nine and of the INDEPENDENCE OF THE UNITED STATES the eighty fourth

BY THE PRESIDENT: /S/ James Buchanan

By /S/ I.A. Leonard, Secretary

/S/ Joe L. Wilson, Acting Recorder of the General Land Office

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
ANADARKO AREA OFFICE

P.O. Box 368
Anadarko, Oklahoma 73005

FEB 21 1968

Mr. Donald Richard Oyler
3 Gillespie Lane
Monterey, California 93940

Dear Mr. Oyler:

This responds to your letter to our Horton Agency Superintendent last fall and your most recent letter to our Washington Central Office expressing interest in and raising questions regarding the Newton and Nancy McNeer estates. Your personal concern over this matter is understood and in order to give you as complete a resume of the facts as possible, we have reviewed certain available records and reports relating to the remaining portion of Shawnee Reserve Allotment No. 206.

As you probably know, this allotment is located in Johnson County, Kansas, approximately 90 miles from the Horton Agency. One other small tract included in a Shawnee Reserve Allotment situated in the same general neighborhood constitute the only lands remaining under our jurisdiction that were originally allotted as Shawnee Reserves.

Nearly all of the Shawnee Reserve allotments were disposed of in some manner subsequent to allotment in 1959. [1859]. According to an heirship determination approved by the Department of Interior under the date of April 5, 1920 (Departmental Probate No. 135679-13; 2853-19) Newton McNeer died sometime during the eighteen sixties, survived by his wife Nancy and at least one child, Mary White Todd. It may be that you have a copy of this "original" heirship determination and are aware that the present ownership would trace title to Mary White Todd, surviving daughter of Nancy McNeer. Apparently, you have a copy of a list of heirs from the Horton Agency showing the interest of Ben Hall estate, and others, and have made considerable progress in learning the addresses of various heirs.

If your prime concern is one of determining the whereabouts of non-Indian heirs of this estate, please be advised that this Bureau can be of no official

assistance to you. We lose jurisdiction over any and all interests in Indian trust or restricted land once it comes into the hands of a non-Indian heir by inheritance through an approved last will and testament, or intestacy. Perhaps of more importance to you is the fact the Secretary of the Interior has no authority to probate the estates of non-Indians or determine their respective heirs. This is a matter solely within the jurisdiction of the appropriate state court.

As we glance over the list of various heirs, nearly all of the major interests are held by non-Indian estates, viz: Ben Hall estate, R. H. Crotzer estate, J. Gerald Elrod (non-Indian) and many others. The situation is further complicated by the fact that to obtain a marketable title to the interests inherited by non-Indians you would require a deed from such heirs (or from heirs of heirs, etc.) supported by a commercial abstract of title (showing state probate proceedings where necessary) or you would need to go upon and take possession of the land in person or by agent and hold the same adversely to said heirs for the period of time imposed by the Kansas State Statutes (believed to be 15 years) and to follow your adverse possession by a quiet title action in a court of competent jurisdiction. Even so, your title would be perfected only against the then current non-Indian interest which

was acquired through inheritance in an unrestricted status. It is also our understanding that payment of taxes upon the land claimed by adverse possession is an essential element.

We feel that it would be a literal impossibility for the Department of Interior to determine the heirs to the McNeer estate, whether Indian or non-Indian. According to our information, most if not all of the original heirs, determined in 1920, had removed from Kansas and settled elsewhere. On some occasions, the death of an heir was reported to the Bureau and attempts made to conduct hearings for the purpose of determining the reported death and heirs. In some cases, presumed heirs were notified to attend scheduled probate hearings in Kansas but did not respond. In the total absence of testimony to show fact of death, the presence or lack of a will, survivors, etc., our Examiners of Inheritance were unable to determine the heirs of Indian decedents and the proceedings were dismissed without further action. Undoubtedly, many deaths have occurred that were unreported. Should any of such heirs (or heirs of Indian heirs) be non-Indian, interests inherited by such persons became unrestricted beyond our control and supervision. Perhaps the foregoing comments will give you a better understanding of why the Indian Bureau has

reached an impasse in its handling of this particular tract.

Considering the above related history, we are certain that any reputable attorney you may choose to consult, if apprised of the facts you have at hand, would give you a fair estimate of the overwhelming cost and hopelessness of attempting to consolidate title to the land under consideration.

You have asked, among other things, that we estimate the per acre value of the McNeer land, furnish lease information, account for accrued lease monies, and suggest some manner in which this land can be disposed of. These questions shall be treated in their order.

This land was inspected in 1951 and valued at \$20 per acre (\$1880) which took into account ten acres of agricultural land and 84 acres of timber. Staff recalls that the appraisal was made for pending or anticipated probates that may or may not have been finalized. According to reports, the McNeer land was last inspected about five years ago by agency personnel who described the same as covered with "undergrowth, rocks, ravines, gullies, and timber.....so thick it was almost impossible to penetrate on foot". Even with the use of an aerial photograph, the on-site inspection of five years ago

failed to reveal the location of the agricultural land reported in 1951. We have had no cause or reason to reappraise the land in recent years.

With respect to leasing history, we note an error in Superintendent Morrison's letter to you as of August 11, 1967 in which he stated that this land was last under lease during 1965 for \$25 per year. The true fact is, that no income has been derived from this land, since 1957 when the sum of \$20 was paid by an adjacent land owner who is reported to have considered he might have been "trespassing" and wished to avoid any charge in this respect. Since that time, we have received no income from the land, although attempts have been made to lease it through advertising. The difficulty here, is the fact that we can only offer and commit for lease the aggregate undivided interest owned by "Indian" heirs (owners) as distinguished from "non-Indian" owners. Quite frankly, we are unable to determine the amount of interest remaining under our control or supervision. As heretofore stated, where "non-Indians" enter the ownership picture, we lose jurisdiction over their undivided shares which become unrestricted.

As to monies received over the past many years, we find the sum of \$122.19 currently on deposit in the account of the McNeer estate, which includes accumulated interest. It may be, that this sum represents the total of all monies received through the agency for leasing this land. You may have the question of why this money has not been distributed? There are multiple answers. The Bureau of Indian Affairs is unauthorized to set up Individual Indian Money Accounts for non-Indians, for we have no authority to lease their interests in the first instance. Therefore, we can only assume that the \$122.19 on deposit is payable to duly determined Indian heirs (owners). Apparently, the agency has not seen fit to attempt a piece-meal distribution of the accrued monies, because of the administrative burden of preparing proper vouchers, having the sum processed, posted, and checks drawn and issued in extremely small sums which would serve no real purpose.

We see no solution to disposing of this land, or the Indian owned interest therein, absent an Act of Congress. Our Washington Office has long recognized the McNeer estate as a most difficult situation. Because of the multiplicity of owners, involving Indians, non-Indians, minors, and unprobated estates, it is virtually impossible under existing law

(emphasis supplied) to dispose of the estate in any manner and convey a marketable title.

The sale of Indian land in multiple ownership, even in the absence of title defects, has been a troublesome problem to the Department of Interior and this Bureau. Over the past several years, various bills have been proposed to the Congress that would authorize the Secretary of the Interior to dispose of Indian land in heirship status. None have been enacted.

It could be suggested that a special Act of Congress be sought that would remove all restrictions from the remaining portion of this particular allotment and extinguish the government's interest. This would permit any one or more of the determined heirs, Indian or non-Indian, to seek a partition of the land and/or have the same sold through the Kansas Courts with the proceeds divided to those entitled, less legal fees and costs. The distributive shares of undetermined heirs would be held by the court until eligibility is established.

Hopefully, the foregoing comments, while belated, will be of help to you in determining a course of action. We regret our inability to present a more favorable outlook.

Sincerely yours,
/s/ Sidney Carney
Area Director

United States Senate
Washington D.C. 20510

February 23, 1982

Mr. Jimmie D. Oyler
P.O. Box 637
De Soto, Kansas 66018

Dear Jimmie:

I wanted to write and explain to you the reasons behind the introduction of Senate Bill 478.

This bill, as you know, does nothing more than allow for the ownership questions in the particular pieces of Kansas lands to be settled in State court. Let me assure you that the sole reason that this legislation came about was to find a way for you, your mother, and all of the other heirs to the land, to legally have what is rightfully yours. Because of the nature of the situation, it is my hope that by allowing for the courts to handle this case, your children, and the children of other heirs will benefit in the manner that was intended when this land was awarded to your ancestors.

S. 478 was drafted with the assistance of the Indian law experts at the U.S. Department of the Interior, the Bureau of Indian Affairs, and the House and Senate Committees on Indian Affairs. Every Indian law expert who has seen the bill has agreed that this is the best way for you and the other heirs to ever hope

to have an outright ownership of any part of the land, and the only way that you and the other heirs can ever sell, or otherwise exchange pieces of the land.

It was never the intention to do you any personal harm, and I sincerely expect that the end result will benefit you, just as it will all of the heirs. While I cannot be involved in lawsuits, I would be happy to be of any assistance possible.

Sincerely yours,
/s/ Bob Dole
BOB DOLE
United States Senate
BD:k

PUBLIC LAW 97-344--OCT. 15, 1982,
96 STAT. 1645.

Public Law 97-344, 97th Congress

An Act

To provide for the partitioning of certain restricted Indian land in the State of Kansas.

Oct. 15, 1982

(S. 478)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any owner of an interest in the following lands:

(1)the north half southeast quarter of section 25, and 14 acres on the south side of southeast quarter northeast quarter of section 25 township 11 south, range 22 east, sixth principal meridian, Kansas, containing 94 acres and also known as the Newton McNeer Shawnee Reserve Numbered 206;

(2)the southeast quarter northwest quarter of section 12, township 12 south, range 23 east, sixth principal meridian, Kansas, containing 20 acres and also known as the Black Snake Shawnee Allotment Numbered 69;

(3)the east half, southwest quarter, section 13, township 19 south, range 24 east, sixth principal meridian, Kansas, containing 80 acres and known as the Maria Christiana Miami Allotment, lands derived from a patent under the Act of March 3, 1859 (11 Stat. 430) may commence an action in

the United States District Court of Kansas to partition the same in kind or for the sale of such land in accordance with the laws of the State of Kansas. Moneys resulting from a sale in lieu of partition shall be distributed and administered through trust accounts of the Bureau of Indian Affairs in the case of Indian heirs. Moneys of non-Indian heirs shall be turned over to the appropriate State court in Kansas for distribution and administration in accordance with the laws of Kansas. For the purpose of such action, the Indian owners shall be regarded as vested with an unrestricted fee simple title to their interests in the land and the United States shall be a necessary party to the proceedings. Any conveyance ordered by the court in such proceedings will be made in unrestricted fee simple to non-Indian grantees and in a restricted fee to Indian grantees.

Approved October 15, 1982
LEGISLATIVE HISTORY-S.478
HOUSE REPORT No 97-341 (Comm on Interior and Insular Affairs.
SENATE REPORT No. 97-107 (Comm on Indian Affairs).

CONGRESSIONAL RECORD

Vol. 127 (1981):
May 21, considered and passed Senate.
Dec. 15, considered and passed House, amended.
Vol. 128 (1982):
Oct. 1, Senated concurred in House amendment.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Judge: JOHN W. LUNGSTRUM

CASE 92-2104-JWL

JIMMIE D. OYLER, SR.,

Plaintiff,

v.

THE UNITED STATES OF AMERICA, ET AL.,

Defendants.

MINUTE ORDER

UPON DIRECTION BY THE COURT:

Pursuant to the court's August 25, 1994 memorandum and order (Doc. #405), the court-appointed commissioners have set September 6, 1994 at 1:30 o'clock p.m. as the date on which they will conduct an appraisal of the Newton McNeer Shawnee Reserve Numbered 206 parcel of land, which is the subject of this litigation.

Given the emotionally charged nature of this case, the court hereby orders the United States Marshal's Office to accompany the commissioners on site to ensure that the appraisal can be conducted expeditiously without interference.

IT IS SO ORDERED this 1st day of
September, 1994.

RALPH L. DeLOACH, CLERK

/s/ Dennis L. Smarker

Dennis L. Smarker, Deputy Clerk

PREMIER BANK

Date October 24, 1994

IRREVOCABLE LETTER OF CREDIT

AMOUNT: \$78,200.00

LETTER OF CREDIT NO. 1320

TO: United States District Court,
District of Kansas.

We hereby establish our Irrevocable
Letter of Credit authorizing you to
draw on the

Premier Bank
15301 W. 87th Street Parkway
Lenexa, Kansas 66219

for the account of Jimmie D. Oyler
P.O. Box 637, DeSoto, Ks. 66018 for a
sum or sums not exceeding a total of
Seventy Eight Thousand Dollars
(\$78,200.00) available by your draft
or drafts at sight for 100% of value
to be accompanied by:

Beneficiary's signed statement that
they are completing the transfer of
interest in the real property known as
Shawnee Reserve 206 as a whole, to the
above named account holder, Jimmie D.
Oyler. This Letter of Credit is
specifically issued to reflect the
account holders proof of ability to
pay the amount, or amounts necessary
to complete the transfer of the real
estate known as Shawnee Reserve 206,
as calculated by account holder, per
court order and parameters. The

Letter of Credit is issued in conjunction with account holders election to acquire the above referenced real property, as per court order in Civil Action No. 92-2104-JWL.

The account holder has elected to acquire the real property for a total of \$78,179.20, based on the following formula:

1. Total improvements at court appraised value plus \$1,000 greater value, making the total amount of improvements offer \$132,500, with the total being owned by Plaintiff, and representing no cost to Plaintiff.

2. Total land value at the court appraised value plus \$1,000 greater value, making the total amount of land offer \$93,000, with cost to Plaintiff being based on BIA Court ordered percent ownership to Plaintiff. Estimated cost to Plaintiff \$74,400.

3. Total commissioner's cost \$18,896 with Plaintiff's cost for commissioner's being \$3,779.20 based on the BIA Court ordered percent of land ownership.

The draft must be dated and presented to Premier Bank for payment no later than the close of our regular business day on October 24, 1995.

The draft must be marked "Drawn under the Premier Bank, Kansas, Letter of Credit Number # 1320.

This credit is subject to Article V of the Uniform Commercial Code as enacted in the State of Kansas (and subject to the "Uniform Customer and Practice for Documentary Credits (1993 Revision), International Chamber of Commerce Brochure No. 500.")

We hereby agree with the drawers, endorsers and bona fide holders of drafts drawn under and in compliance with the terms of this credit that the same shall be duly honored on due presentation to the drawee.

Payment cannot be made unless the above document is furnished exactly as requested.

Premier Bank

By: /s/ Mike Yancey V.P.
Mike Yancey, Vice President

BANK IV Kansas City
Post Office Box 14040
Shawnee Mission, Kansas 66285-4040
Telephone 913-752-4444

October 14, 1994

Clerk of the United States District Court
for the District of Kansas
517 United States Court House
500 State Avenue
Kansas City, KS 66101

RE: Irrevocable Letter of Credit #51200

Gentlemen:

We hereby establish an Irrevocable Commercial Letter of Credit No. 51200 effective October 14, 1994, in your favor for the account of Ronald G. Sparkman for a sum not exceeding Two Hundred Fifty Thousand and 00/100 (\$250,000.00) U.S. Currency, available by your draft or drafts at sight for 100% of value.

The draft must be dated and presented to BANK IV Kansas, N.A. 100 East Santa Fe, Olathe, KS 66061, for payment no later than close of our regular business day on January 12, 1995. The draft must be marked "Drawn under BANK IV Kansas, N.A. Letter of Credit No. 51200.

This credit is subject to Article V of the Uniform Commercial Code as enacted in the State of Kansas (and subject to the "Uniform Customs and Practice for Documentary Credits (1983 Revision) International Chamber of Commerce Brochure No. 400")

We hereby agree with the drawers, endorsers and bona fide holders of drafts drawn under and in compliance with the terms of this credit that the same shall be duly honored on due presentation to the drawee.

BANK IV will pay to the Beneficiary up to \$250,000 upon receipt of a Court order confirming the election of Ronald G. Sparkman to assume all of the beneficial interests in the Shawnee Reserve No. 206 legally described as:

M+B in SENE POB SE/CNR of SENE; T.N462'; T.S462'; T.E. 1320'; to POB containing 14 Acres, M/L; NSE, Sec. 25-T12S-R22E., Sixth Principal Meridian, KS, containing 80 Acres (94)

Payment cannot be made unless the above documents are furnished exactly as requested.

BANK IV Kansas, N.A.

/S/J. Mack Bowen, Pres. Olathe
J. Mack Bowen, President/Olathe

ATTEST:

/S/Gregory L. Sims
Gregory L. Sims, Vice President

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Judge: JOHN W. LUNGSTRUM

CASE No. 92-2104-JWL

JIMMIE D. OYLER, SR.
Plaintiff,
v.

THE UNITED STATES OF AMERICA, et al.,
Defendants.

NOTICE OF
MARSHAL'S SALE

By virtue of the Court's November 17, 1994 Memorandum and Order, ordering the sale of the below described real property located in Johnson County, Kansas, I will, on WEDNESDAY, THE 22nd day of March, 1995, at 2:00 o'clock P.M. of said day at the north door of the Johnson County Courthouse, Olathe, Kansas, offer for sale at public auction and sell to the highest bidder for cash in hand, all of the right, title and interest of the defendants above named in and to the following described real estate, located in Johnson County, Kansas to-wit:

North One Half of the Southeast Quarter and the South 14 acres on the south side of the Southeast Quarter of the Northeast Quarter of Section 25, Township 12 South, Range 22 East, Johnson County, Kansas, more particularly described as metes and bounds as follows:

Beginning at the Southeast Corner of said Southeast Quarter of the Northeast Quarter; then North 462 feet; thence West 1320 feet; then South 462 feet; thence East 1320 feet to the true point of beginning, said tract containing 94.00 acres, more or less, being subject to the public road right-of-way known as Cedar Creek Road, all other easements and restrictions now on record.

The property will be sold without further appraisal, subject to any unpaid real property taxes or special assessments, if any, and without redemption rights.

United States Marshal's Office, Topeka, Kansas, this 6th day of February, 1995.

RAND ROCK
United States Marshal
District of Kansas

/S/ FRANK J. EMMA, SDUSM

February 15, 1995 - Page 13A

First Published in The Johnson County Sun,
Wednesday, February 15, 1995.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Judge: JOHN W. LUNGSTRUM

CASE No. 92-2104-JWL

JIMMIE D. OYLER, SR.

Plaintiff,

v.

THE UNITED STATES OF
AMERICA, et al.,

Defendants.

NOTICE OF MARSHAL'S SALE

By virtue of the Court's November 17, 1994 Memorandum and Order, ordering the sale of the below described real property located in Johnson County, Kansas, I will, on WEDNESDAY, the 22nd day of March, 1995, at 2:00 o'clock P.M. of said day at the north door of the Johnson County Courthouse, Olathe, Kansas, offer for sale at public auction and sell to the highest bidder for cash in hand, all of the right, title and interest of the defendants above named in and to the following described real estate, located in Johnson County, Kansas to-wit:

North One Half of the Southeast Quarter and the South 14 acres on the south side of the Southeast Quarter of the Northeast Quarter of Section 25, Township 12 South,

Range 22 East, Johnson County, Kansas, more particularly described as metes and bounds as follows: Beginning at the Southeast Corner of said Southeast Quarter of the Northeast Quarter; then North 462 feet; thence West 1320 feet; then South 462 feet; thence East 1320 feet to the true point of beginning, said tract containing 94.00 acres, more or less, being subject to the public road right-of-way known as Cedar Creek Road, all other easements and restrictions now on record.

The property will be sold without further appraisal, subject to any unpaid real property taxes or special assessments, if any, and without redemption rights.

United States Marshal's Office, Topeka, Kansas, this 6th day of FEBRUARY, 1995.

RAND ROCK
United States Marshal
District of Kansas
/S/ Frank J. Emma SDUSM
(14392 4W)

FILED MAR 29 1995
RALPH L. DeLOACH, Clerk
/S/ S. B.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Judge: JOHN W. LUNGSTRUM

CASE No. 92-2104-JWL

JIMMIE D. OYLER, SR.

Plaintiff,
v.

THE UNITED STATES OF AMERICA, et al.,

Defendants.

RETURN OF MARSHAL

I have received this Order of Sale this 1st day of February, 1995 and according to the demands thereof, I proceeded according to law to advertise and sell, without further appraisement, the premises therein directed to be sold, to wit:

North One Half of the Southeast Quarter and the South 14 acres on the south side of the Southeast Quarter of the Northeast Quarter of Section 25, Township 12 South, Range 22 East, Johnson County, Kansas, more particularly described as metes and bounds as follows: Beginning at the Southeast Corner of said Southeast Quarter

of the Northeast Quarter; then North 462 feet; thence West 1320 feet; then South 462 feet; thence East 1320 feet to the true point of beginning, said tract containing 94.00 acres, more or less, being subject to the public road right-of-way known as Cedar Creek Road, all other easements and restrictions now on record.

15th, 22nd, 1st and and I did, on the 8th day of February/March, 1995 cause a public notice to be published in the SUN NEWSPAPERS, a newspaper published in the County of JOHNSON, Kansas, and of general circulation in said county, once a week for at least four consecutive weeks prior to the sale; that I did offer said land and tenements for sale at the north door of the Johnson County Courthouse, Olathe, Kansas on the 22nd day of March, 1995, at 2:00 o'clock P.M. of said day; and I caused Notice of Sale to be published once a week for four consecutive weeks prior to the day I sold said lands and tenements as herein stated, said Notice of Sale being published on the following days in the SUN newspaper: 2/15; 2/22; 3/1 and 3/8/95, and at the time and place stated in said Notice of Sale,

I sold said lands and tenements to _____ being the highest and best bidder therefore. Dated this _____ day of _____, 1995.

RAND ROCK
United States Marshal
District of Kansas
/S/ FRANK J. SIMS SDUSM

SERVICE FEES: \$ 40.00
MILEAGE: \$ _____
PUBLICATION: \$ 211.72
TOTAL COSTS: \$ 251.72

This sale was canceled due to the issuance
of a Memorandum of Order issued by Judge
Lungstrum on March 17, 1995.

Not Reported in F. Supp.
(Cite as 1993 WL 191573 (D. Kan.))

Judge: JOHN W. LUNGSTRUM

CASE No. 92-2104-JWL

Jimmie D. OYLER, Sr.,
Plaintiff,

v.

The UNITED STATES of America, et al.,

Defendants.

No. 92-2104-JWL.

United States District Court, D. Kansas.

May 6, 1993.

Loren W. Mall, Lewis, Rice &
Fingersh, Overland Park, KS, James E.
Townsend, John S. Clifford, Peter
Lancaster, Dorsey & Whitney, Minneapolis,
MN, for plaintiff.

Janice M. Karlin, Office of U.S.
Atty., Kansas City, KS, for U.S., Bruce
Babbitt, Eddie Brown, Bureau of Indian
Affairs.

Robert A. Ford, Johnson County Legal
Dept., Olathe, KS, for Johnson County,
Kan.

Kip A. Kubin, Payne & Jones, Chtd.,
Overland Park, KS, for Nancy Taylor, Carol
Todd, Estate of Edna Marie Angel Jensen,
Bernard E. Kretchmar, Jeffrey Morgan

Blair, Donna Blair, Christopher H. Blair,
Deborah Blair, Della M. Cowan, Sharon
Curray, Willie Richard Hamil, Ronald
Headrich, Vernon Kulchinski, Raymond
Prusa.

Barbara Ballinger, Barbara Blair
Burke, Harold Demoss, Tommy Lee Beckham,
Wanda Brannan, Tyrell S. Wilcox, Mildred
Laduke, Marlene Sparkman, Melba Spires,
Cornelia Sparkman, Glenda Sparkman.

Kip A. Kubin, Payne & Jones, Chtd.,
C. Maxwell Logan, Shock, Hardy, & Bacon,
Overland Park, KS, for remaining
defendants.

Dana L. Parks, Frank B. W. McCollum,
Hamann, Holman, South, McCollum & Hansen,
P.C., Virginia P. Perez, Law Offices of
Martin M. Meyers, Kansas City, MO, for
Jeffrey Willcox Hurt, Jeanne Ree Hurt
Mullins, Patricia Hurt, Ross Bob Mullins.

Mildred Nadine B. Laduke, pro se.

Kip A. Kubin, Payne & Jones, Chtd.,
Overland Park, KS, Janice M. Karlin,
Office of U.S. Atty., Kansas City, KS, C.
Maxwell Logan, Shock, Hardy & Bacon,
Overland Park, KS, for George Fredrick
Williams.

Kip A. Kubin, J. Tyler Peters, Payne
& Jones, Chtd., Overland Park, KS, for
Sammy Dale Ballenger, Margaritte P.
Currey, Zelma Kulchinski, Mary E. Martin,
Jeannette S. Naphy, Richard Eugene
Patterson, Sandra Jensen Smith, David K.
Veal, Robin Patterson Veal.

Roy L. Miller, pro se.

MEMORANDUM AND ORDER

LUNGSTRUM, District Judge.

*1 The first phase of trial was held in the above case on May 4, 1993. This phase was limited to Mr. Jimmie D. Oyler's claims concerning "unrestricted" interests in Shawnee Reserve 206 located in Johnson County, Kansas. Mr. Oyler bases his claims to these interests on certain quitclaim deeds that he received from other co-tenants and on his adversely possessing his co-tenants' unrestricted interests. Based on the evidence presented and the arguments of the parties, this court makes the following findings of fact and conclusions of law.

I. Findings of Fact.

1. The approximately 94 acres that is the subject of this action (the "Land") is the same land described in paragraph (1) of Public Law 97-344, 96 Stat. 1645 (October 15, 1982), as amended ("P.L. 97-344"), and is known as Shawnee Reserve 206. The Land (together with other land) was conveyed by the United States of America to Newton McNeer, a Shawnee Indian, on December 28, 1859, subject to a restriction on sale or conveyance without the consent of the Secretary of the Interior ("Secretary").

2. Since 1859, certain interests in the Land have become "unrestricted" either by conveyance approved by the Secretary or through inheritance by non-Indians.

3. Plaintiff Jimmie D. Oyler, an Indian descendant of Newton McNeer, owns a partial undivided interest in the Land as a co-tenant with an undetermined number (currently thought to number around 50) other co-tenants.

4. No evidence was presented which controverted the validity of quitclaim deeds to Mr. Oyler from co-tenants Barbara Ann Ballenger Beckham and her husband Tommy Lee Beckham, Dixie Lee Jenkins Bandy and her husband William R. Bandy, Jimmie Harold Currey, Alma Sparkman Hershman Wilson and her husband Harold W. Wilson, Beverly Ann Ballenger Cox, and Myrtle Sparkman Roberts.

5. For purposes of this lawsuit, there are three categories of co-tenants in the Land: (1) Indians who own only restricted [FN1] interests in the Land, (2) Indians who own both restricted and unrestricted interests in the Land, and (3) non-Indians who own unrestricted interests in the Land. It is not necessary to determine who falls within each category for the purpose of this phase of the lawsuit.

6. Since the summer of 1975, plaintiff Jimmie D. Oyler has been in actual, continuous and open possession of the Land.

7. At his own expense, Mr. Oyler has made numerous improvements to the Land since he took possession, including a house, roads, a water supply system, a pole barn, a lagoon, and a smoke shop.

8. Such improvements and activities on the land did not provide any co-tenants with actual or constructive notice that they had been "ousted" from the land.

9. Mr. Oyler has not paid any taxes on the Land nor have any been levied by Johnson County during this period.

10. Mr. Oyler sent a letter concerning the Land to the Secretary of the Interior on September 15, 1975 which stated his intent "to hold it adversely if necessary against all Non-Indian Heirs and adjacent landowners." A copy was sent to the Anadarko Area Office of the Bureau of Indian Affairs. This letter was admitted into evidence at trial as Exhibit 2.

*2 11. The Anadarko Area Office holds the land title records for the restricted interests in the Land but does not keep such records for unrestricted interests.

12. Non-Indians did not receive notice, whether actual or constructive, of Mr. Oyler's intent to adversely possess their interests in the Land by reason of the 1975 letter sent to the Anadarko Area Office because their unrestricted interests in the Land were not recorded there and Mr. Oyler only stated, at best ambiguously, that he would hold the Land adversely "if necessary."

13. The 1975 letter to the Anadarko Area Office did not provide notice, whether actual or constructive, to Indians that Mr. Oyler intended to adversely possess their unrestricted interests in the Land, in any event, because the letter

only made reference to adverse possession "against all Non-Indian Heirs."

14. From 1975 until the commencement of this lawsuit in 1992, Mr. Oyler assured certain Indian co-tenants that he was protecting their interests in the Land. He did not tell any Indian co-tenants that he was attempting to adversely possess their unrestricted interests in the Land.

15. Mr. Oyler's possession of the land from 1975 until the filing of this lawsuit has not been hostile to the ownership interests of any Indian co-tenants.

II. Conclusions of Law.

1. This court has subject matter jurisdiction over this matter pursuant to P.L. 97-344.

2. Kansas law is applicable to this partition action. P.L. 97-344.

3. In order to obtain the interests of his co-tenants in the Land by adverse possession the plaintiff must show that he has been in open, exclusive, and continuous possession of the Land, K.S.A. 60-503 (1983), and has provided notice, whether actual or constructive, and that he has repudiated the rights of his co-tenants (i.e. ousted them) for a period of 15 years. Schwab v. Wyss, 136 Kan. 54, 57, 12 P.2d 79 (1932).

4. "[A]dverse possession may be inferred from outward acts, open and notorious claim of ownership, and exercise

of exclusive right. It has also been held that it is not absolutely essential that the co-owner should have actual knowledge; a tenant in common will be deemed to have notice of the adverse holding by his cotenant where the hostile character of the possession is so open and manifest that a man of reasonable diligence would discover it." Nelson v. Oberg, 88 Kan. 14, 21, 127 P. 767 (1912) (emphasis added).

5. "The evidence necessary to establish an ouster by a tenant in common must be positive, clear, and unequivocal. Having gone into possession of the land as a tenant in common, the law presumes that the character of his possession does not change and has reference to the title under which he entered [i.e. as a tenant in common]. Therefore, before it can be held that a tenant in common in possession has committed the wrong of ousting his co-tenant, the acts which constitute the ouster, and the intent on the part of the tenant in common in possession to oust his co-tenant, must be clearly and satisfactorily shown." Schoonover v. Tyner, 72 Kan. 475, 480, 84 P. 124 (1905).

*3 6. "[T]he simple fact that one of the cotenants has possession is not of itself adverse to other co-tenants. Such possession becomes adverse to the other tenants only when the tenant in possession is claiming title and the right to possession to the exclusion of his co-tenants when that matter is brought home to them... '[I]t must be borne in mind that the knowledge of the hostile attitude of the possessor is not to be presumed,

but must be shown by proof so as to preclude all doubt of the want of knowledge on the part of the owner...." Schwab, 136 Kan. at 57 (citation omitted).

7. Mr. Oyler has not shown by positive, clear, and unequivocal evidence that he has adversely possessed the unrestricted interests of any of his cotenants, whether they are Indian or non-Indian, for a fifteen year period. The matter was not "brought home" to his cotenants "by proof so as to preclude all doubt" of their lack of knowledge of what he intended.

8. Mr. Oyler has not obtained any additional interest in the Land by adverse possession. [FN2]

9. Mr. Oyler has obtained all unrestricted interests held by co-tenants Barbara Ann Ballenger Beckham and her husband Tommy Lee Beckham, Dixie Lee Jenkins Bandy and her husband William R. Bandy, Jimmie Harold Currey, Alma Sparkman Hershman Wilson and her husband Harold W. Wilson, Beverly Ann Ballenger Cox, and Myrtle Sparkman Roberts as conveyed by quitclaim deed.

10. Pursuant to the Pretrial Order dated March 11, 1993, a second trial will be conducted for the purpose of determining the percentage interests of all remaining owners of the Land, and partitioning the Land among them, in kind or by sale, pursuant to P.L. 97-344 and K.S.A. 60-1003. In the second trial, the parties shall establish the extent and nature of their claimed interest in the

Land, including but not limited to the issue of whether such interest is held in restricted or unrestricted status. To that end, a telephone status conference will be held at 10:00 a.m. on May 26, 1993.

III. Conclusion

IT IS THEREFORE ORDERED BY THE COURT that Mr. Jimmie D. Oyler has not obtained by adverse possession any additional interest which he does not hold by conveyance or inheritance in the approximately 94 acres described in P.L. 97-344 and known as Shawnee Reserve No. 206.

IT IS FURTHER ORDERED that Mr. Jimmie D. Oyler has obtained any interest, the conveyance of which does not require the approval of the Secretary of the Interior, in Shawnee Reserve No. 206 held by defendants Barbara Ann Ballenger Beckham and her husband Tommy Lee Beckham, Dixie Lee Jenkins Bandy and her husband William R. Bandy, Jimmie Harold Currey, Alma Sparkman Hershman Wilson and her husband Harold W. Wilson, Beverly Ann Ballenger Cox, and Myrtle Sparkman Roberts.

IT IS SO ORDERED.

FN1. A restricted interest may not be conveyed without the approval of the Secretary.

FN2. The court recognizes the considerable labor expended and expense incurred by Mr. Oyler over the years in improving the Land, albeit in a "rent

free" status from his co-tenants perspective. However, Mr. Oyler is at liberty to pursue the question of his contribution to the Land's fair market value at the partition phase of the trial.

END OF DOCUMENT

Not Reported in F.Supp.
(Cite as: 1993 WL 105119 (D. Kan.))

Judge: JOHN W. LUNGSTRUM

CASE No. 92-2104-JWL

Jimmie D. OYLER, Sr.,
Plaintiff

v.

The UNITED STATES of America, et al.
Defendants.

United States District Court, D. Kansas.

April 2, 1993.

Loren W. Moll, Lewis, Rice & Fingersh, Overland Park, KS, James E. Townsend, John S. Clifford, Peter Lancaster, Dorsey & Whitney, Minneapolis, MN, for plaintiffs.

Janice M. Karlin, Office of U.S. Atty., Kansas City, KS, for U.S., Bruce Babbitt, Eddie Brown, and Bureau of Indian Affairs.

Robert A. Ford, Johnson County Legal Dept., Olathe, KS, for Johnson County, Kan.

Kip A. Kubin, Payne & Jones, Chtd., C. Maxwell Logan, Shook, Hardy & Bacon, Overland Park, KS, for Barbara Ballenger, Tommy Lee Ballenger, Tommy Lee Beckham, George Blair, Alma Dicy Blair, Houston Blair, Sybil Blair, Jeffery Blair, Christopher Blair, Alice Maxie Cowan

Bowlan, Mary Brannan Boyles, Glenn Clyde Brannan, Robert Clark Brannan, Delphia Parrett Brannan, Wanda Brannan, Barbara Blair Burke, J.M. Cowan, Dick Currey, Ernestine Hall, Ernestine Hall DeMoss, Janice Sparkman, Jerry Graham, Billy Wayne Hamil, Jana Hamil, William Hamil, Patsy LuLou Keller Headrick, Ocie Lois Blair Holloway, Edna Marie Angel Jensen, Ed Jensen, Robert H. Keller, Jan Keller, Jack Hall Keller, Betty Keller Kretchmer, Bernard E. Kretchmer, Mildred Nadine B. Laduke, Rebecca Branan Davis Loyd, James Loyd, Myrtle Nevada Hamil McLaughlin, Sam McLaughlin, Margaret F. Williams Middleton, Jeanne Ree Hurt Mullins, Patricia J. Hollis Parker, Leah B. Alice Emerson Prusa, Mary Ann Currey, Cornelia Sparkman, David Sparkman, Ronald Sparkman, Melba Marvia Hamil Spires, L.D. Spires, Jill Keller Thomas, C.J. Thomas, Dorothy S. Todd, John R. Todd, Charles H. Todd, Jr., Tyrell Wilcox, George Frederick Williams, Joan Keller Zeman, Jeffrey Morgan Blair, Donna Blair, Christopher H. Blair, Deborah Blair, Della M. Cowan, Sharon Currey, Willie Richard Hamil, Ronald K. Headrick, Vernon Kulchinski, Raymond Prusa, Glenda Sparkman, and Marlene Sparkman.

Dana L. Parks, Frank B.W. McCollum, Hamann, Holman, South, McCollum & Hansen, P.C., Kansas City, MO, Virginia P. Perez, Law Offices of Martin M. Meyers, Kansas City, MO, for Jeffery Wilcox Hurt, Patricia E. Hurt, Ross Bob Mullins.

ORDER

LUNGSTRUM, District Judge.

*1 This matter comes before the court on the United States' motion for partial summary judgment (Doc. # 287) and the Exhibit A [FN1] defendants' motion for partial summary judgment (Doc. # 285). A hearing was held on these motions on March 15, 1993, and the motions were taken under advisement. For the reasons set forth below, the United States' motion for partial summary judgment is granted and the Exhibit A defendants' motion for partial summary judgment is granted in part and denied in part.

I. Facts.

The following facts are accepted as uncontested for the purpose of these motions for summary judgment. On December 28, 1859, Newton McNeer, a Shawnee Indian, was issued a restricted fee patent from the United States pursuant to the May 10, 1854 Treaty with the Shawnee Indians and the Act of March 3, 1859, 11 Stat. 430, for 387.30 acres of land. The patent provides that the lands "shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior, for the time being." Today, approximately 94 acres remain of this original grant and are owned by over fifty Indian and non-Indian owners as cotenants. Because of the incompleteness of heirship records, the Bureau of Indian Affairs ("BIA") has not been able to conclusively determine the identity and fractional ownership of the 94 acres. This multiple fractionated ownership has also impeded the economic use of the land. As a result, in 1981, Congress passed Public Law 97-344 ("the Act") to allow

partition of the land.

The plaintiff, Jimmie D. Oyler, a Shawnee Indian, claims to have acquired the non-Indian or unrestricted [FN2] interests in the land by adverse possession. Between September 8, 1975 and May 1, 1986 the plaintiff has acquired the restricted and unrestricted interests of some of his cotenants. The conveyances of the restricted interests conveyed during this period have been approved by the BIA. The plaintiff has known, since at least 1975, of the existence of both restricted and unrestricted interests in the 94 acres which were not owned by the plaintiff.

The plaintiff sent a letter in 1975 to various parties stating his intention to acquire the nonrestricted interests in the 94 acres by adverse possession. The plaintiff occupied the land at some time (the actual time of occupation is in contention) and lives there presently. Mr. Oyler did not move his family onto the land nor did he take meals or showers there on a permanent basis until sometime after August 1980. He has never evicted any cotenants or prevented them from coming onto the property.

In 1991 and 1992, the plaintiff attempted to purchase the ownership interests of several other cotenants who held restricted interests in the land. On January 13, 1992, plaintiff submitted to the BIA for approval eight notarized deeds which purported to convey him certain undivided, restricted interests in the 94 acres. The BIA has not yet approved these conveyances. The present action was filed

by Mr. Oyler on March 17, 1992, pursuant to P.L. 97-344, to partition the 94 acres.

II. Standard for Summary Judgment

When considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the nonmoving party. *Barber v. General Electric Co.*, 648 F.2d 1272, 1276 n.*1 (10th Cir. 1981). A moving party who bears the burden of proof at trial is entitled to summary judgment only when the evidence indicates that no genuine issue of material fact exists. *Fed.R.Civ.P. 56(c); Maughan v. S.W. Servicing, Inc.*, 758 F.2d 1381, 1387 (10th Cir. 1985). If the moving party does not bear the burden of proof at the trial, it must show "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

*2 Once the movant meets these requirements, the burden shifts to the party resisting the motion to "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The nonmovant may not merely rest on the pleadings to meet this burden. *Id.* Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250; *Tersiner v. Union Pacific R.R.*, 740 F.Supp. 1519, 1522-23 (D.Kan. 1990). More than a "disfavored procedural shortcut," summary judgment is an important procedure "designed 'to secure the just, speedy, and

inexpensive determination of every action.' Fed.R.Civ.P. 1." Celotex, 477 U.S. at 327.

III. United States' Motion for Partial Summary Judgment

The United States has moved for partial summary judgment on the issue of whether P.L. 37-344 provides this court with authority to approve certain conveyances of restricted interests in the 94 acres which have not yet received BIA approval. For the reasons set forth below, the court holds that P.L. 37-344 does not provide this court with such authority.

P.L. 37-344 provides as follows:

[A]ny owner of an interest in the following lands:may commence an action in the United States District Court for Kansas to partition the same in kind or for the sale of such land in accordance with the laws of the State of Kansas.... For the purpose of such action, the Indian owners shall be regarded as vested with an unrestricted fee simple title to their interests in the land and the United States shall be a necessary party to the proceedings. Any conveyance ordered by the court in such proceedings will be made in unrestricted fee simple to non-Indian grantees and in a restricted fee to Indian grantees.

The plaintiff argues that the Act gives this court the power to approve conveyances to him of restricted interests which have not yet received BIA approval.

The United States argues otherwise and this court agrees with the United States' interpretation of the Act.

The plain language of the Act does not provide this court with the authority to approve prior conveyances of restricted interests. The plaintiff argues that such authority is conferred by the sentence, "For the purpose of such action, the Indian owners shall be regarded as vested with an unrestricted fee simple title to their interests in the land...." The plaintiff argues that because the Indian owners may be regarded as having an unrestricted title for the purpose of this action, the court has been given the power to approve conveyances of restricted interests in the land without BIA approval in order to quiet title to the entire 94 acres as part of the partition action.

The plaintiff's argument is not supported by the plain language of the Act. When the Act states that the court may regard the Indian owners as having unrestricted interests, it does so "[f]or the purpose of such action." When the Act says "such action" it refers to a previous sentence in which it states that certain people "may commence an action in [this court] to partition." Therefore, reading the Act as a whole, it means that the court may regard the Indian owners as vested with an unrestricted fee simple title to their interests in the land only for purposes of the action to partition. The effect, then, is that the court does not need BIA approval to partition the land. There is no indication, however, in the language that the Act was designed to

preempt the role of the BIA in approving or disapproving conveyances made from separate from a partition suit.

*3 Moreover, the Act is a waiver of sovereign immunity because the United States is a necessary defendant to the suit. "[A]ny waiver of the National Government's sovereign immunity must be unequivocal. Waivers of immunity must be construed strictly in favor of the sovereign, and not enlarge[d] ... beyond what the language requires." *United States Department of Energy v. Ohio*, 112 S.Ct. 1627, 118 L.Ed.2d 255 (1992). Interpreting the Act in the way that the plaintiff suggests would construe it against the power of the BIA to regulate conveyances of restricted Indian lands. Interpreting the Act to allow the BIA to retain the exclusive power to approve conveyances of restricted lands construes it in favor of the United States and does not enlarge it beyond the language of the Act. Thus the rule of strict construction goes hand-in-hand with the plain meaning of the statute to dictate that the motion should be granted.

The plaintiffs, it should be noted, argue that the legislative history of the Act demonstrates that Congress intended to give this court the power to approve conveyances of restricted interests. However, there is no need to address the legislative history because the language of the statute is clear (and the legislative history is unclear.) *United States v. Hill*, 971 F.2d 1461, 1466 n. 9 (10th Cir.1992) (en banc) ("[O]ur resort to the legislative history is proper only

when the statutory language is unclear."). Therefore, the legislative history will not be considered in determining this matter.

For the reasons stated above, the United States' motion for summary for judgment is granted. This court does not have the authority to approve conveyances of restricted interests which lack BIA approval in the subject land. For purposes of the action to partition, all those Indian individuals who have given deeds to Mr. Oyler for unapproved conveyances of restricted interests [FN3] remain the owners and "shall be regarded as vested with an unrestricted fee simple title to their interests in the land" [FN4] for the purpose of partitioning it. P.L. 37-344.

IV. The Exhibit A Defendant's Motion for Summary Judgment

The plaintiff claims to have adversely possessed the unrestricted interests of his cotenants in the 94 acres. The Exhibit A defendants challenge this claim in their motion for partial summary judgment. For the reasons set forth below, the motion is granted in part and denied in part.

The plaintiff's claim for adverse possession of the unrestricted interests in the 94 acres is pursuant to K.S.A. 60-503, which states:

Adverse Possession. No action shall be maintained against any person for the recovery of real

property who has been in open, exclusive and continuous possession of such real property, either under a claim knowingly adverse or under a belief of ownership, for a period of 15 years.

(Emphasis added.) According to the statute, a claim for adverse possession may either be based on "a claim knowingly adverse" or "a belief of ownership." The plaintiff does not controvert the fact that he was aware of other ownership interests to the 94 acres which he did not own. Therefore, the court grants summary judgment against the plaintiff on his claim for adverse possession based on "a belief of ownership."

*4 In contrast, there are genuine issues of material fact concerning the plaintiff's claim of adverse possession under a claim knowingly adverse of the unrestricted interests in the 94 acres. Therefore, summary judgment is not proper on that claim. [FN5]

"Whether or not a possessor acquires title by adverse possession is a question of fact." Renensland v. Ellenberger, 1 Kan.App.2d 659, 574 P.2d 217, (1977). It is uncontested that the plaintiff holds his interest as a cotenant with those owning unrestricted interests in the land. When a cotenant, i.e. a tenant in common, takes possession of property "his possession is presumed to be in common with other cotenants and for their use and benefit as well as his own." Schwab v. Wyss, 136 Kan. 54, 57, 12 P.2d 719 (1932).

Thus, resolution of the question of fact presented here must be guided by the special rules established in light of the presumption, many of which are of hoary vintage.

There are two requirements for adverse possession from a cotenant: ouster and notice. The possession of land by a cotenant only becomes adverse to his or her cotenants when "the tenant in possession is claiming title and the right to possession to the exclusion of his cotenants." The cases often refer to this requirement of exclusive possession as "ouster." Schoonover v. Tyner, 72 Kan. 475, 480, 84 P. 124 (1905).

"A cotenant who has actual knowledge of the existence of other cotenants cannot hold title adversely to the other cotenants until the other cotenants have knowledge or notice of the fact of the adverse holding." Renensland, 574 P.2d at 222 (citing Schwab). The following are the requirements for knowledge or notice:

The notice or knowledge required may be actual, as in the case of a disavowal or disclaimer of any right in his cotenants, or it may be inferred from acts or circumstances attending such adverse possession, which are overt, notorious and unequivocal in their character and import. From such acts it is the duty of the other cotenants to be informed thereof and to draw such reasonable inferences therefrom as prudent persons possessed of and interested in like information would naturally do, and such cotenants out of possession cannot prevent the operation of

the statute of limitation by proving that they did not know of the facts affecting their interest, or, knowing of them, did not draw correct conclusions therefrom.

Scwab, 136 Kan. at 57. Finally, all of the acts of a party who attempts to adversely possess against cotenants "will be construed against his claim if reasonably open to that construction." Id. at 58.

If the trier of fact chooses to believe Mr. Oyler, he has met the requirements of ouster and notice. Mr. Oyler contends the following. He was informed by the BIA that he could obtain the unrestricted interests in the land by adversely possessing them. He wrote a letter in 1975 to the BIA (who records interests in Indian land) and other parties, including the local newspaper, stating that he intended to adversely possess the unrestricted interests in the 94 acres. He threatened to kill another cotenant if he interfered with his possession of the land. The plaintiff made several improvements on the land, including a house and a smokeshop. These improvements have been characterized as a veritable "fortress." Other cotenants were aware that Mr. Oyler was seeking to adversely possess the unrestricted interests in the land. These contentions, if believed, could lead a trier of fact to conclude that Mr. Oyler has met the requirements of ouster and notice and therefore has adversely possessed the unrestricted interests in the land.

*5 The Exhibit A defendants argue,

however, that the Kansas courts virtually have held as a matter of law that a cotenant who seeks to acquire his or her cotenants' interests during the period of adverse possession may not obtain his or her cotenants' interests by adverse possession. This court disagrees.

Kansas courts have not held that attempting to acquire cotenants' interests automatically precludes adverse possession from cotenants. The defendants have pointed to three Kansas Supreme Court cases as standing for their position, but these cases do not so hold, at least where the adverse possession is premised on "a claim knowingly adverse."

In Schoonover v. Tyner, 72 Kan. 475, 84 P. 124 (1905), the Kansas Supreme Court determined that a cotenant had not adversely possessed against another cotenant. The reasons given by the court for denying the cotenant's claim for adverse possession were that (1) he never claimed the entire tract of land, (2) he never was in adverse possession of the entire tract of land (i.e. he had never ousted any cotenants), (3) he recognized the interests of his cotenants by purchasing some of their interests and dividing the land with some of them, and (4) he did not live on the divided portion of land to which he claimed exclusive ownership for the statutory period necessary to claim it by adverse possession. Id. at 480.

The court stated the following concerning the possessing cotenant's acquisition of his cotenants' interests

during the statutory period:

These acts alone are a complete refutation of the claim now made that [the possessing cotenant] was holding adversely and claiming to own the entire title to the property. Such acts are a continual recognition of the outstanding interests of his cotenants, and cannot be reconciled with a claim of exclusive ownership and adverse possession.

Id. Schoonover, then, is distinguishable because, in that case, the possessing cotenant was "claiming to own the entire title to the property" and claimed "exclusive ownership", i.e. he had a belief of ownership, as the statute now describes that alternative basis for adverse possession, while Mr. Oyler is seeking to adversely possess the 94 acres under "a claim knowingly adverse." Mr. Oyler's claim to adversely possess under a belief of ownership has been dismissed by this summary judgment and is no longer within the case.

The Schoonover case was entirely logical in concluding that acquiring and recognizing the interests of cotenants is inconsistent with a claim of adverse possession under a belief of ownership. How can one, in good faith, both believe that he or she is the exclusive owner, and at the same time, recognize the interests of others by attempting to buy them out? However, this same logic does not apply to one adversely possessing under "a claim

knowingly adverse." When such an adverse possessor knows that others are claiming an interest in the land, by definition he or she wants to deprive them of whatever interest they may claim by adversely possessing it from them. He or she does not necessarily deny their interest, but simply attempts to appropriate it. Therefore, acquiring interests of others by conveyance or gift during the statutory period, a sort of belt and suspenders approach to dealing with the problem, is not inconsistent with adversely possessing under "a claim knowingly adverse."

*6 The plaintiffs next point to *Sparks v. Bodensick*, 72 Kan. 5, 82 P. 463 (1905) as supporting their position. In *Sparks*, the adverse possessor also sought to claim title to land with a claim of exclusive ownership, i.e. what would now be called a belief of ownership. He had obtained a deed to the land from a cotenant but the deed purported to convey to him the entire ownership interest in the land. Later, the adverse possessor sought out some of the other cotenants and purchased their interests. Concerning those purchases, the court held that "the effect of the acceptance of a deed to an outstanding interest by one in possession under a claim of ownership must be interpreted according to the surrounding circumstances." *Id.* at 10. This language indicates that the Kansas Supreme Court did not even intend to fashion a rule of law that precluded adverse possession when someone who had a belief of ownership acquired other cotenants' interests. Instead, the court viewed such an act as a factor to be considered in the light of

"the surrounding circumstances." This case certainly does not support the defendants' position that the Kansas courts have adopted a rule of law that would preclude Mr. Oyler, who is adversely possessing the unrestricted interests in the 94 acres.

Finally, in Squires v. Clark, 17 Kan. 84, 88 (1876), the court held that when an adverse possessor purchases his cotenants' interests in the subject land, the adverse possessor has "recognized in the plainest possible manner the rights of some of his co-tenants." Squires, of course, must be read in conjunction with the later decided Sparks case, in which the Kansas Supreme Court softened this language by stating, as quoted above, that the effect of purchasing cotenants' interests "must be interpreted according to the surrounding circumstances." Sparks, 72 Kan. at 10. Thus, Squires is not determinative here. [FN6]

For the reasons set forth above, the Exhibit A defendants' motion for partial summary judgment on Mr. Oyler's adverse possession claim which is made under a claim knowingly adverse is denied. The case will proceed to trial on May 4, 1993.

V. Conclusion

IT IS THEREFORE ORDERED BY THE COURT that the United States' motion for partial summary judgment (Doc. # 287) is granted.

IT IS FURTHER ORDERED that the Exhibit A defendants' motion for partial summary judgment (Doc. # 285) is granted

in part and denied in part.

IT IS FURTHER ORDERED that summary judgment is granted on Mr. Jimmie Oyler's claim for adverse possession of the subject land under a belief of ownership.

IT IS FURTHER ORDERED that summary judgment is denied on Mr. Jimmie Oyler's claim for adverse possession of the subject land under a claim knowingly adverse.

IT IS SO ORDERED.

FN1. The Exhibit A defendants consist of those parties who claim an adverse interest in the land which is the subject of this suit and are represented by Payne and Jones, Chartered of Overland Park, Kansas. They are Mary Bauer, Barbara Ann Ballenger Beckham, Tommy Lee Beckham, Alma Dicy Blair, Christopher H. Blair, Deborah Blair, Donna Blair, George Blair, Jeffery Morgan Blair, Sybil Blair, Mary Brannan Boyles, Delphia Parrett Brannan, Glenn Clyde Brannan, Robert Clark Brannan, Wanda Brannan, Barbra Blair Burke, Della M. Cowan, J.M. Cowan, Dick Currey, Sharon Currey, Earnestine Hall DeMoss, Estate of Harold DeMoss, Janice Sparkman Graham, Jerry Graham, Billy Wayne Hamil, Jana Hamil, Willie Richard Hamil, Patsy Lulou Keller Headrick, Ocie Lois Blair Holloway, Earl Jensen, Edna Marie Angel-Estate Jensen, Jack Hall Keller, Jan Keller, Robert H. Keller, Bernard E. Kretchmer, Betty Keller Kretchmer, Estate of Vernon Kulchinski, Mildred Nadine B. Laduke, James Loyd, Rebecca Brannan Davis Loyd, Myrtle Nevada Hamil McLaughlin, Sam

McLaughlin, Margaret F. Williams
Middleton, Patricia J. Hollis Parker, Leah
Alice Emerson Prusa, Mary Ann Currey
Purdum, Cornelia Sparkman, David Sparkman,
Glenda Sparkman, Marlene Sparkman, Ronald
Sparkman, L.D. Spires, Melba Marvis Hamil
Spires, Nancy Taylor, C.J. Thomas, Jill
Keller Thomas, Carol Todd, Charles H.
Todd, Jr., Dorothy S. Todd, John R. Todd,
Tyrell S. Wilcox, and Joann Keller Zeman.

FN2. A restricted fee patent is a BIA term which applies to a parcel or interest in land in which the Indian owner holds the legal or fee title subject to a federal restriction against alienation, encumbrance, and taxation. Certain interests in the 94 acres are restricted and thus subject to BIA approval before a conveyance is completed while there are other interests in the subject land which are unrestricted.

FN3. This includes Barbara Ann Ballenger Beckham, Jimmy Harold Currey, Beverly Ann Ballenger Cox, Myrtle Sparkman Roberts, Alma Sparkman Hershman Wilson, Margaret F. Williams Middleton, George Frederick Williams, and Dixie Lee Jenkins Bandy.

FN4. However, the action to partition is governed by Kansas law. Such an action is equitable in nature. *Renensland v. Ellenberger*, 1 Kan.App.2d 659, 574 P.2d 217, 223 (1977). See K.S.A. 60-1003(d). Therefore, the court may take into account in the action to partition any compensation that Mr. Oyler paid to those individuals who purported to convey their interests to him.

FN5. The plaintiff does not claim to adversely possess the restricted Indian interests in the land nor could he because such interests are protected from adverse possession by federal law. See 28 U.S.C. 2409a(a).

FN6. If this concept seems to give aid and comfort to conduct which might be viewed as less than commendable-taking another's interest in land without paying for it- it should be recalled that the Kansas adverse possession statute is a statute of limitations which establishes a bar to lawsuits by any party against whom a taking is attempted. Thus, nothing would have prevented anyone with a competing claim from having challenged Mr. Oyler's possession by their own legal action within the limitation period. In this case's procedural posture, moreover, the burden still remains on Mr. Oyler to prove, at trial, that he has satisfied the legal requisites to prevail.

Judge: JOHN W. LUNGSTRUM

CASE No. 92-2104-JWL

Jimmie D. Oyler, Sr.,
Plaintiff,

v.

The UNITED STATES of America, et al.,
Defendants.

United States District Court, D. Kansas.

July 7, 1995.

James E. Townsend, John S. Clifford,
Peter Lancaster, Dorsey & Whitney,
Minneapolis, MN, Loren W. Moll, Bryan
Cave, Overland Park, KS, for Jimmie D.
Oyler, Sr., Shawnee Co., a Kan. Corp.

Jimmie D. Oyler, Sr., DeSoto, KS, pro
se.

Janice M. Karlin, Office of U.S.
Atty., Kansas City, KS, for U.S..., Bruce
Babbitt, Secretary, Eddie Brown, Asst.
Secretary - Indian Affairs, Bureau of
Indian Affairs, U.S. Dept. of Interior.

Kip A. Kubin, Payne & Jones, Chtd.,
Overland Park, KS, C. Maxwell Logan,
Olathe Medical Center, Olathe, KS, for
defendants.

MEMORANDUM AND ORDER

*1 This matter is currently before
the court on the motion of the plaintiff
Jimmie D. Oyler for reconsideration of the

court's order of March 17, 1995 (Doc. #457), on the motion of the governmental defendants for reconsideration of the same order (Doc. #464), and on the motion of plaintiff certain additional relief (Doc. #474). On May 18, 1995, this court granted plaintiff's and defendants' motions for reconsideration in part (Docs. #457, #464), to the extent that the court found reconsideration warranted on certain limited issues, but reserved judgment whether its order of March 17, 1995 should actually be modified as requested by the parties. Having held a hearing on the issues with which the court was concerned, the court is now prepared to determine whether the March 17 order, from which a judgment was entered in this case, should be modified. The court finds that the order should be modified to allow Mr. Oyler certain compensation for his water supply system and to reflect the substance of the stipulation entered into between Mr. Oyler and defendant Jimmy Currey. The order and judgment shall not be modified in any other respect. The court also clarifies the status of the land after partition with respect to those Indians who have land in both restricted and unrestricted status. To the extent the motions for reconsideration seek any other relief, they are denied. Plaintiff's second motion (Doc. #474) requesting various other relief is also denied.

I. Legal Standards

The court applies essentially the same legal standards to Rule 59(e) motions to alter or amend judgment and motions for reconsideration under the local rules.

Henry v. Office of Thrift Supervision, No. 92-4272, 1993 WL 545195, at *1 (D. Kan. Dec. 28, 1993) (citing *Hilst v. Bowen*, 874 F.2d 725, 726 (10th Cir. 1989)), aff'd 43 F.3d 507 (10th Cir. 1994)). A motion for reconsideration allows a party to allege fundamental legal errors that require the court to reconsider an earlier decision. *Federated Mut. Ins. Co. v. Botkin Grain Co.*, 856 F. Supp. 607, 309 (D. Kan. 1994). Reconsideration is proper when there has been a manifest error of law or fact, when new evidence has been discovered or when there has been a change in the relevant law. *All West Pet Supply Co. v. Hill's Pet Prods. Div., Colgate Palmolive Co.*, 847 F. Supp. 858, 860 (D. Kan. 1994). A party cannot invoke Rule 59(e) to raise arguments or evidence that should have been raised in the first instance or to rehash arguments previously considered and rejected by the court. See *id.*; *Botkin Grain Co.*, 856 F. Supp. at 609. Whether to grant or deny a motion to reconsider is committed to the district court's sound discretion. *Henry*, 1993 WL 545195, at *1 (citing *Hancock v. City of Oklahoma City*, 857 F.2d 1394, (10th Cir. 1988); *Lavespere v. Niagra Mach. & Tool Works, Inc.*, 910 F.2d 167, 174 (5th Cir. 1990), cert. denied, 114 S. Ct. 171 (1993)).

II. Plaintiff's Motion for Reconsideration

*2 In his motion plaintiff seeks the following: reconsideration of the March 17 order, a court order that the Constitution of the United States guarantees the 1854 Treaty with the Shawnee is the supreme law of the land,

and a motion that the Bureau of Indian Affairs' (BIA) Title Status Report (TSR) dated September 19, 1994 and chain of title be certified as containing the exact percent ownership for plaintiff and all defendants. Mr. Oyler also makes a proposal to the defendants apparently for settlement purposes and, in addition, demands a jury trial and public auction. Many of the issues raised by Mr. Oyler have been dealt with multiple times in previous orders. As to these issues the court is not persuaded that it has made a clear error of fact or law or that reconsideration is warranted to prevent manifest injustice. However, the court shall grant, in part, Mr. Oyler's motion with respect to the issue of his water supply and irrigation system to his home.

Plaintiff first argues that an easement granted to Johnson County over the subject property violates the 1854 Treaty with the Shawnee. Plaintiff refers to a settlement agreement he and the defendants entered into, which the court approved, in which Johnson County received an easement over the subject property. as to this issue, plaintiff's motion is actually a motion for reconsideration of the court's order denying reconsideration of this issue. [FN1] Plaintiff's first motion for reconsideration was over 18 months out of time, and this one now passes the two-year mark. The present motion is denied as out of time and as entirely duplicative of his previous motion. Moreover, the cited portions of the treaty and the Constitution do not alone support Mr. Oyler's request for relief and such relief is denied on

substantive grounds as well.

Plaintiff next argues that the 1854 Treaty with the Shawnee entitles him to a certain percentage ownership in the land as well as a specific location on the property. Once again plaintiff's motion is one to reconsider the court's prior order

denying reconsideration and is based on the same or similar arguments previously made. The motion is denied as duplicative and consequently procedurally improper. See All West Pet Supply Co., 847 F. Supp. at 860 (A party cannot invoke Rule 59(e) to raise arguments that should have been raised in the first instance or to rehash arguments previously considered and rejected by the court.) Moreover, plaintiff's theory of relief based on the 1854 Treaty with the Shawnee does not appear in the pretrial order and therefore is not properly an issue in this case. And finally, plaintiff's motion is denied because the court does not believe the treaty entitles plaintiff to the relief he presently seeks.

Plaintiff next argues that the percent ownership interests used in the court's March 17, 1995 order to partition the land in kind were in error. The order partitioned the land in strict accordance with the stipulation of the parties as updated by a recent TSR from the BIA. This issue has been addressed multiple times by the court. Plaintiff continues to take issue with the stipulation he agreed to after the original proceeding on adverse possession in July of 1993. [FN2]

*3 At the June 8, 1995 hearing pertaining to plaintiff's motion, Mr. Oyler for the first time in the tortured history of this case argued that the settlement and stipulation was not comprehensive [FN3] and that the percentages used by the court were therefore incorrect. This new argument may be rejected solely on the basis that it is completely out of time. Moreover, the court finds, as a matter of fact, that the settlement was comprehensive and that it was meant to bind all the parties as well as the subsequent course of this litigation. The issue os the percentage of interests was for the most part settled two years ago. Reconsideration of this issue is not warranted to prevent manifest injustice. [FN4]

Next, plaintiff complains that the relief ordered has left him with little, if any land, in front of certain buildings and has taken the road leading to his home. Plaintiff's complaints, however, are not borne out by the maps in evidence or Exhibits 1 & 2 admitted in conjunction with the court's March 17 order. [FN5] Thus, there is no evidence in the record that the court's order damages plaintiff to the extent claimed and the court will not modify its order on this issue. Moreover, even if plaintiff is prevented from using a portion of his road as a result of partition, the court would in any event find that further relief in this regard is not necessary to prevent manifest injustice. [FN6] Also, to prevent any confusion, contrary to plaintiff's complaints, plaintiff is not, in fact, prevented by the court's order

from using land he otherwise owns near the subject property, nor is he denied access to 83rd street.

Plaintiff next argues that the court has overlooked his water supply system. In this regard, plaintiff is correct. However, the court points out that Mr. Oyler failed to timely object to the proposed partition on this ground either in his papers or at two hearings expressly held to entertain any objections he or any other party might have. Had he done so the issue easily could have been resolved before the court adopted the substance of the Exhibit A defendants' proposal. Instead, his belated objection forced all of the parties and the court to expend time and energy and undergo the expense to solve this problem. Despite this fact, the court will modify its previous order with respect to the water supply system because it finds a modification necessary to prevent manifest injustice.

When the court granted Mr. Oyler sole ownership of his improvements as part of the partition, this included the water supply system to his home fed only by a natural spring on the property. However, the court overlooked the fact that the spring is located on the eastern portion of the subject property which was granted to the Exhibit A defendants in the court's order. [FN7] Thus, the court unwillingly deprived Mr. Oyler of his source of water as well as the value of some of his improvements (the water supply system he built is of little value absent a water source). By the same token, the court unwittingly enriched the Exhibit A

defendants by, in effect, giving them access to the spring.

*4 In light of the circumstances, an alternate source, namely access to a rural water line, is necessary to put Mr. Oyler in the position intended by the court's March 17 order of partition. After hearing evidence with regard to this issue at the June 8 hearing, the court finds, that to effect a fair and equitable partition in this action, plaintiff should receive, in addition to the relief already granted, funds in amount equal to five-thousand seven-hundred and fifty dollars (\$5,750.00). [FN8] This amount will cover the potential cost of a hook-up to the rural water line nearest plaintiff's property as estimated by Fred Jones, manager of Rural Water District No. One in Johnson County, Kansas. [FN9] The court also finds that the Exhibit A defendants should bear this cost and hereby orders them to do so. [F10] The court believes it fair that the Exhibit A defendants bear this cost in light of the fact that they will now receive the benefit of the spring, in light of their decision not to grant Mr. Oyler an easement for the spring's use, and in light of the court's granting them other relief in the March 17 order.

To the extent plaintiff seeks any other relief in his motion for reconsideration it is denied. Plaintiff raises no other arguments nor offers other evidence indicating reconsideration of the March 17 order is warranted. [FN11]

III. Defendants' Motion for

Reconsideration

The governmental defendants have asked the court to reconsider one issue in its March 17, 1995 order, namely the issue of Jimmy Currey's interest in Shawnee Reserve No. 206, and to clarify the title status after the partition. The governmental defendants objected to Mr. Oyler receiving a credit for certain funds paid to Mr. Currey, arguing that Mr. Oyler already received all of the interest in the land purportedly conveyed to him by Mr. Currey. Since the filing of the defendants' motion, Mr. Oyler and Mr. Currey have entered into a stipulation resolving this dispute.

The stipulation and agreement (Doc. #471) provides, among other things, that the parties agree that "all future orders in this case should assume that the .0028935185 interest in Shawnee Reserve 206, shown on the September 19, 1994 Title Status Report attached to the governmental defendants' Motion dated April 7, 1995, as belonging to Jimmy Currey, still belongs to Jimmy Currey, instead of to Jimmie D. Oyler, and that Jimmie Oyler has not paid Jimmy Currey for that interest." The court recognizes the validity of this agreement and shall modify its March 17 order to reflect the court's approval of this binding agreement. Pursuant to this stipulation, to the extent the court's March 17, 1995 order indicates that Mr. Oyler, instead of Jimmy Currey, owns or has any equitable interest in that .0028935185 interest inherited by Jimmy Currey from his father, the order shall be modified to reflect that Mr. Oyler will

not receive a credit for consideration he previously alleged he had paid to Mr. Currey for this interest. Mr. Currey will receive from the Exhibit A defendants his interest at the appraised value otherwise in accordance with the March 17, 1995 order.

*5 In addition, the court notes that it has found and continues to find that Mr. Currey retained a .0072337962 mineral interest in Shawnee Reserve No. 206 and that this mineral interest was not conveyed to the plaintiff. The court is persuaded from the evidence in the record that Mr. Currey retained this mineral interest. To the extent this factual finding was not clearly set forth in the court's March 17, 1995 order, that order is hereby clarified to reflect this finding.

The governmental defendants also ask the court to clarify its March 17, 1995 order to make clear how each defendant owner will hold title after the partition is completed. Public Law 97-344 states that, "Any conveyance ordered by the court...will be made in unrestricted fee simple to non-Indian grantees and in a restricted fee to Indian grantees." See P.L. 97-344, 96 Stat. 1645 (Oct. 15, 1982). All of the parties agree that, consistent with this provision, as to each party/owner receiving partitioned land, all the subject land presently owned by an Indian owner will be held, as a result of the partition, in restricted fee, and that all the subject land owned by a non-Indian will be held in unrestricted fee simple.

The parties' understanding of the law with regard to the title status of the land after partition comports with that of the court and, thus, the court's March 17, 1995 order is hereby clarified to reflect this universal understanding. Accordingly, after the conclusion of this action, those Indians who are having land partitioned to them will hold title to their present interest in the land, regardless of whether it was held in restricted or unrestricted fee prior to the partition, in restricted fee. Likewise, all non-Indians who are having land partitioned to them will hold their interest in unrestricted fee. This court does not purport to determine or predict, however, the title status of any interest in Shawnee Reserve No. 206 which might be acquired after the conclusion of the court-ordered partition.

IV. Plaintiff's Motion for Additional Relief [FN12]

In his motion plaintiff seeks the following: (1) that the court certify and confirm that his mother passed away on February 3, 1986; (2) that the court certify and confirm that he was not an heir to the subject property at the time he adversely possessed it; (3) that the court certify and confirm that he did not become a co-owner until he received a quitclaim deed from Gerald Elrod; (4) that the court grant that he became a restricted co-owner on April 28, 1986; (5) that the court grant that Shawnee Reserve 206 be sold at public auction; (6) that the court grant that the stipulation of July 12, 1993 be declared "as having

served its purpose which plaintiff states was for meetings with the court appointed magistrate to attempt a partition settlement and nothing more"; (7) that the court grant that the "total restricted interest plaintiff has purchased" be conveyed to plaintiff; and (8) that the court grant that he has adversely possessed all non-Indian interests in the land.

*6 Plaintiff's "motion" is in fact not a motion at all, but a recitation of arguments and allegations of "facts" that plaintiff either has made previously or now believes are relevant to issues decided long ago. Plaintiff states no substantive basis in the law for such relief nor is it at all clear what procedural rule he contends affords him the opportunity to bring such a "motion". The relief sought, in effect, is to return to the very beginning of this action and to revisit virtually every issue decided in the course of three years of litigation. Plaintiff's motion is denied as without foundation in the law and legally frivolous. Because of plaintiff's pro se status, the court has bent over backwards to afford him a fair opportunity to present his claims in this action. The court will not, however, permit plaintiff to further delay the conclusion of this action by the filing of frivolous motions. Plaintiff's motion for additional relief is, therefore, denied. [FN13]

V. Conclusion

Pending the court's ruling on the motions for reconsideration, there has

been no execution of the judgment entered in this case on March 17, 1995 (Doc #456). [FN14] All pending motions having been fully and finally resolved, the court will now order a stay of execution upon the judgment for 60 days to allow time for an appeal. Should no appeal be taken during this period, execution on the judgment may proceed forthwith.

IT IS THEREFORE ORDERED BY THE COURT that the motion of plaintiff Jimmie D. Oyler for reconsideration of the court's order of March 17, 1995 (Doc. #457) is granted in part and denied in part in accordance with this opinion.

IT IS FURTHER ORDERED BY THE COURT that the motions of the governmental defendants for reconsideration (Doc. #464) is granted in part and denied in part in accordance with this opinion.

IT IS FURTHER ORDERED BY THE COURT that the motion of plaintiff for certain additional relief (Doc. #474) is denied.

IT IS FURTHER ORDERED BY THE COURT that execution upon the judgment in this action shall be stayed for 60 days.

IT IS SO ORDERED.

FN1. Plaintiff is charged with knowing the rules of procedure of this court. Those rules do not permit him to use a motion for reconsideration simply as a vehicle to rehash old arguments or to attempt to make better arguments than ones made previously. All West Pet Supply Co., 847 F. Supp. at 860. Should plaintiff

attempt reconsideration of this issue yet another time, the court will be forced to impose a requisite sanction.

FN2. In his papers, Mr. Oyler states that he was informed before the stipulation that his lawyer was not going to continue to represent him. He, however, presents no evidence in this regard. The letter attached to Doc. #474, purported to be evidence of his contention, is dated after the stipulation was entered into and, further, does not indicate that the representation was to terminate. There is absolutely no evidence in the record that Mr. Oyler was under duress when he entered into the stipulation, that there was any question that he was being represented by competent counsel at the time, or that the stipulation and agreement was otherwise invalid.

FN3. This issue was not on the docket to be discussed at the June 8 hearing. The court held that hearing for certain, very limited issues, the validity of the July 1993 stipulation not being one of them. The court refused to hear evidence or argument from Mr. Oyler contrary to what was stipulated to because it would have, in effect, set this action back almost two years. Such a result would fly in the face of the letter and spirit of the procedural rules of this court which seek to bring about the orderly adjudication of complicated and, especially as in this case, emotional disputes.

FN4. In its March 17 order, the court stated that "those owners in favor of mixed relief and opposed to a public

sale...represent a clear majority or the largest percentage of ownership of the land (roughly 69 acres...)." The court notes that the 69 acre figure was not completely accurate because it included those acres owned by unrepresented non-Indian cotenants of the land who were served but did not make an appearance in this action. (The court ordered the Exhibit A defendants to purchase their interest at the appraised value and to direct the proceeds to the state of Kansas for distribution and probate, for most of these owners are deceased.) However, what was significant to the court at the time it rendered its decision was and remains true, that a clear majority of persons with an interest in the land, and those representing the largest percentage of ownership in the land, were in favor of mixed relief and opposed to a sale. Thus, the court finds no justification for modifying further the relief granted in the March 17 order.

FN5. Plaintiff did not make a timely objection to the proposed partition on this basis, despite ample opportunity to do so, both on paper and in open court at the hearings in March. For this additional reason, plaintiff's objection is overruled.

FN6. At the hearing, plaintiff offered evidence that the cost of installation of pipe necessary to reach the rural water hook-up would be \$3,440.00. See Plaintiff's Exhibit 1. The Exhibit A defendants objected to the admission of such evidence on the grounds that it was hearsay. The court allowed Mr. Oyler to

present the evidence and took the objection under advisement. The court now sustains the Exhibit A defendants' objection and, accordingly, will not consider such evidence for purposes of this motion. The evidence is not admissible under Federal Rule of Evidence 802 because it is hearsay: a written assertion, defined as a "statement" in Rule 801(a), not made by the person making it, defined as the "declarant" in Rule 801(b), at trial. Moreover, even if the court were to consider this evidence, it would not find payment of such a cost to Mr. Oyler appropriate here. Mr. Oyler may remove his existing pipe from the tract of land set aside to the Exhibit A defendants before they take possession and he is able to use that pipe and his own labors to effect the connection to his new water source. Although the court has accorded much deference to Mr. Oyler's diligence in making improvements on the property, it does not overlook the fact that he has also derived significant benefit from the land to the exclusion of his co-owners.

FN9. See Plaintiff's Exhibit 2 admitted into evidence at the June 8 hearing.

FN10. Consistent with the court's March 17 order, the Exhibit A defendants are to deposit this amount with the court. The money will first be applied, on behalf of Mr. Oyler, to court costs assessed to Mr. Oyler. Once Mr. Oyler's portion of the court costs have been fully paid, if that should occur, Mr. Oyler may apply for and from the court receive the remainder of the funds to which he is due in accordance with this and previous orders of the

court.

FN11. As a final note, the court wishes to make clear that, despite the plaintiff's claims, any notion or argument that he was forced "under duress and armed force" by the United States government to agree to the percent of ownership and appraisal is totally preposterous and wholly without merit.

FN12. In conjunction with his motion (Doc. #474), plaintiff also replied or responded to the Exhibit A defendants' brief in support of their position that plaintiff not receive any additional compensation for his water system. To the extent plaintiff's filing responds to the Exhibit A defendants' filing and addresses the issue of plaintiff's water supply system, it has been thoroughly considered by the court.

FN13. To the extent plaintiff's filing dated April 10, 1995 (Doc. #465) titled a "reply" sought any additional relief, it too is denied.

FN14. For clarification purposes, the court notes that the Exhibit A defendants and the Hurt/Mullins defendants take ownership of their respective tracts of land, as a result of this partition, as tenants in common. Moreover, the court retains jurisdiction to issue a supplemental order, if necessary, after the partition has been consummated which would further identify the percentage interests of the owners of the three remaining partitioned tracts as requested by the BIA. END OF DOCUMENT.

FILED FEB 08 1996

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PATRICK FISHER, CLERK

Before BRORBY, EBEL and HENRY, Circuit Judges.

No. 95-3283, (D.C. No. 92-CV-2104)
(D.Kansas)

JIMMIE D. OYLER,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, BRUCE BABBITT, Secretary of the United States Department of Interior, BUREAU OF INDIAN AFFAIRS, of the United States Department of the Interior; WILLIAM R. BANDY, BARBARA BALLENGER, a/k/a Barbara Ann Ballengaer Beckham; TOMMY LEE BECKHAM, GEORGE BLAIR, ALMA DICY BLAIR, ESTATE OF HOUSTON BLAIR, SYBIL BLAIR, ALICE MAXIE COHEN BOWLAN, ESTATE OF TILFORD BOWLAN, MARY BRANNAN BOYLES, A. H. BOYLES, ESTATE OF CHARLES FRANKLIN BRANNAN, FRANCES HANDY BRANNAN, a/k/a Frances Handy Brannan Wallace, a/k/a Frances Hanley Brannan; GLENN CLYDE BRANNAN, DELPHIA PARRETT BRANNAN, ROBERT CLARK BRANNAN, WANDA BRANNAN, BARBARA BLAIR BURKE, NAOMI LOUISE EMERSON CASEY, ESTATE OF ADA COWAN, J. M. COWAN, BEVERLY A. BALLENGER COX, ESTATE OF R. H. CROTZER, ESTATE OF WILLIAM F. CURREY, JR., a/k/a Bill Currey; DICK CURREY, JIMMY CURREY, ESTATE OF W.F. CURREY, ERNESTINE HALL, a/k/a Ernestine Hall DeMoss; HAROLD

DEMOSS, ESTATE OF J. GERALD ELROD, ESTATE OF MARY S. ELROD, ESTATE OF JACKSON EMERSON, MORGAN EMERSON, VICTOR J. EMRESON, JANICE SPARKMAN, a/k/a Janice Sparkman Graham; JERRY GRAHAM, ESTATE OF BENJAMIN E. HALL, a/k/a Ben Hall; ESTATE OF DELLA TANNER HALL; ESTATE OF EDITH SMITH HALL, ESTATE OF FRANK HALL, ESTATE OF MAY HALL, BILLY WAYNE HAMIL, PATSY LULOU KELLER HEADRICK, OCIE LOIS BLAIR HOLLOWAY, JEFFREY WILSOX HURT, ESTATE OF EDNA MARIE ANGEL JENSEN, ED JENSEN, FEROL E. SPARKMAN JINGST, ESTATE OF ETHELYNE HALL KELLER, ESTATE OF HOMER KELLER, ROBERT H. KELLER, JAN KELLER, JACK HALL KELLER, BETTY KELLER KRETCHMAR, BERNARD E. KRETCHMAR, ANNA LOUISE PATTERSON KRUSE, ESTATE OF HALLIE HALL, a/k/a Hallie Hall Kulchinski; ESTATE OF ERWIN KULCHINSKI, MILDRED NADINE B. LADUKE, REBECCA BRANNAN DAVIS LOYD, JAMES LOYD, EDNA MAE SPARKMAN MARSHALL, WILLIAM FRANKLIN MARSHALL, MYRTLE NEVADA HAMIL McLAUGHLIN, a/k/a Lavada Hamil McLaughlin; JEANNE REE HURT MULLINS, THELMA MARIE BALLINGER MURPHY, ROY MURPHY, DONALD RICHARD OYLER, PATRICIA J. HOLLIS PARKER, ESTATE OF PAT PATTERSON, ESTATE OF RONALD PATTERSON, LEAH ALICE EMERSON PRUSA, MARY ANN CURREY, a/k/a Mary Ann Currey Purdum; MYRTLE F.L.S. ROBERTS, a/k/a Myrtle Sparkman Roberts; DAVID SPARKMAN, RONALD SPARKMAN, RUBY SPARKMAN, L. D. SPIRES, THOMAS D. STEPHENSON, W. T. STEPHENSON, JILL KELLER THOMAS; C. J. THOMAS, DOROTHY S. TODD, ESTATE OF FLORA A. TODD, JOHN R. TODD, CHARLES H. TODD, JR., ESTATE OF JOHN WAGNER, ESTATE OF LOIS TODD WAGNER, HERBERT WILCOX, GEORGE FREDRICK WILLIAMS, ALMA SPARKMAN HERSHMAN, a/k/a Alma Sparkman Hershman Wilson; HAROLD W.

WILSON, JOAN KELLER ZEMAN, EARL W. ALLEN, JEFFREY MORGAN BLAIR, DONNA BLAIR, CHRISTOPHER H. BLAIR, DEBORAH BLAIR, CECIL CASEY, JIM COOMBES, DELLA M. COWAN, ALICE CRUMBLISS, SHARON CURREY, CAROL EMERSON, WILLIE RICHARD HAMIL, ELIZABETH L. HAMIL, RONALD K. HEADRICK PATRICIA E. HURT, PATTY KELLER, KARL E. KRUSE, VERNON KULCHINSKI, ROSS BOB MULLINS, CAROLYN OYLER, RAYMOND PRUSA, ESTATE OF MYRTLE HALL SEBERT, EVERETT SEBERT, CORNELIA SPARKMAN, GLENDA SPARKMAN, MARLENE SPARKMAN, KENNETH ROY SPARKMAN, MELBA MAVIS HAMIL SPIRES, a/k/a Melba Leona Hamil Spires; NANCY TAYLOR, CAROL TODD, ROBIN KECK TODD, TYRELL S. WILLCOX, MELVIN ZEMAN, JOHN DOE, MARY ROE, SAMMY DALE BALLINGER, FRANCIS BAUER, MARY B. BAUER, MARY JANE CASH, EMOGENE F. CHASTAIN, a/k/a Emogene Satterwhite; ELLIS W. COWAN, NOBLE E. COWAN, SYDWELL W. COWAN, MARGARITTE P. CURREY, PAT CURREY, MARY S. ELROD, ZELMA KULCHINSKI, MARY E. MARTIN, ROY L. MILLER, JEANNETTE S. NAPHY, JOAN L. PATTERSON, LINDA SUE PATTERSON, RICHARD EUGENE PATTERSON, RODNEY SMITH, SANDRA JENSEN SMITH, DAVID K. VEAL, ROBIN PATTERSON VEAL, ADA DEER, Assistant Secretary of the Interior for Indian Affairs; JOYCE RAY JENKINS COOMBES, DIXIE LEE JENKINS BANDY, Defendants-Appellees.

No. 95-3283

(D.C. No. 92-CV-2104) (D. Kansas)

ORDER AND JUDGMENT*

Before BRORBY, EBEL and HENRY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Mr. Oyler is a pro se litigant who lost his civil case in the trial court and now appeals that judgment to this court. We exercise jurisdiction and affirm.

***** BEGIN FOOTNOTE(S) HERE *****

*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

Mr. Oyler commenced this action seeking to establish his title to real property by adverse possession and requesting partition. The trial court bifurcated the trial and after the first phase of the trial denied Mr. Oyler's claims for adverse possession. The parties then stipulated as to ownership and the trial court appointed three commissioners for the purposes of appraisal and division of the property. Following hearings, the trial court entered its order partitioning

the land in kind and ordered various supplemental relief.

Mr. Oyler appeals these orders raising ten issues. The issues are summarized by stating Mr. Oyler vehemently asserts the trial court incorrectly decided the facts and misapplied the law.

We begin our review by noting Mr. Oyler has failed to provide transcripts of the numerous evidentiary hearings and of the trial. We summarize briefly Mr. Oyler's arguments in this regard as it typifies the content of his brief. Mr. Oyler contends it is Appellees' responsibility to furnish transcripts. He cites us to Fed. R. App. P. 10(b)(3) which provides the appellee may file "additional transcripts". He accuses Appellees of sitting on their hands and doing nothing. Mr. Oyler asserts Appellees "have failed to be vigilant and have slumbered in this matter in all respects." Mr. Oyler misperceives the law. It is appellant's responsibility to provide the Court of Appeals with the proper record on appeal. King v. Unocal Corp., 58 F.3d 586, 587 (10th Cir. 1995). Neither this court nor the appellees have any responsibility to secure the transcripts from the court reporter. Without a transcript to review, this court must accept the trial court's findings of fact. We are unable to review a trial court's findings of fact without a transcript of the testimony. Without this transcript we are unable to determine whether the trial court's findings were supported by the evidence or not and under these circumstances we have no alternative but to accept the trial court's factual

findings. We must therefore conclude the trial court's findings of fact are proper. The basic facts found by the trial court may be read at 1993 WL 105119 as this decision was not reported in the Federal Supplement.

Mr. Oyler's arguments as to the applicable law are predicated in large part upon the assumption the trial court's factual findings are incorrect. Nevertheless, we feel we should specifically address one issue raised by Mr. Oyler. The trial court found certain purported conveyances of restricted interests in the real property to Mr. Oyler had not been approved by the Bureau of Indian Affairs and it concluded it had no jurisdiction to approve these prior conveyances of the restricted interests as the exclusive jurisdiction to approve these conveyances rested with the Bureau of Indian Affairs. See Oyler v. United States, 1993 WL 105119 ((D. Kan. Apr. 2, 1993)). Mr. Oyler contends this ruling was erroneous as a matter of law. Based upon the facts found in this case, we affirm this ruling of the district court for substantially the same reasons set forth by the trial court therein.

We have considered all of the issues raised by Mr. Oyler and we have not been persuaded the trial court erred.

The judgment of the district court is AFFIRMED. ENTERED FOR THE COURT:

/S/ WADE BRORBY
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Before BRORBY, EBEL, and HENRY, Circuit Judges.

JIMMIE D. OYLER,

Plaintiff-Appellant,

v. No. 95-3283

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

ORDER

Filed March 21, 1996

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc.

Upon consideration thereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, the suggestion for rehearing en banc is denied.

Entered for the Court
PATRICK FISHER, Clerk
By: /S/ L.BALZANO
Deputy Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
BYRON WHITE UNITED STATES COURTHOUSE
1823 STOUT STREET
DENVER, COLORADO 80257
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PATRICK FISHER ELISABETH A. SHUMAKER
CLERK CHIEF DEPUTY CLERK
March 29, 1996

Mr. Ralph L. DeLoach
Clerk
United States District Court for the
District of Kansas
500 State Avenue
628 U.S. Courthouse
Kansas City, KS 66101

Re: 95-3283, Oyler v. USA, et al
Lower docket: 92-CV-2104

Dear Mr. DeLoach:

In accordance with Fed. R. App. P. 41, I enclose a certified copy of the court's order and judgment, which constitutes the mandate in the subject case. By direction of the court, the mandate shall be filed immediately in the records of the trial court or agency.

The clerk will please acknowledge receipt of this mandate by file stamping and returning the enclosed copy of this letter. Any original record will be forwarded to you at a later date.

CERTIFICATE OF SERVICE

Please contact this office if you have any questions.

Sincerely,

PATRICK FISHER
Clerk

By: /S/ JIM POWERS
Deputy Clerk

PF:jtp

cc: Jimmie D. Oyler
Janice Miller Karlin, Asst. U.S.
Attorney
Kip A. Kubin
J. Tyler Peters
Virginia P. Perez
Roy L. Miller

This is to certify that I, Jimmie D. Oyler, Petitioner, this day, April 30, 1996, did deposit, three (3) copies of Petitioner's **PETITION FOR WRIT OF CERTIORARI**, in the United States Mail, First Class postage paid, addressed to the following as listed below.

Janice Miller Karlin
U.S. Department Of Justice
500 State Avenue, Suit 360
Kansas City, KS 66101-2433
913-551-6730

Kip A. Kubin
Payne & Jones
Commerce Terrace
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Johnson County Legal Department
Robert A. Ford
Assistant County Counselor
111 South Cherry, Suite 3200
Olathe, KS 66061-3441
913-764-8484, Ext 5385

Jimmie D. Oyler
State of Kansas
County of Johnson
Subscribed to me this 30th day of April, 1996 that Jimmie D. Oyler appeared before me.

